REPORTS

OF

CASES

ARGUED AND DETERMINED

England
K

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

AND IN THE

HOUSE OF LORDS:

FROM

EASTER TERM 36 *GEO.* III. 1796,

TO

TRINITY TERM 39 *GEO.* III. 1799.

BOTH INCLUSIVE.

With Tables of the Caſes and Principal Matters.

By JOHN BERNARD BOSANQUET, OF LINCOLN'S INN, and CHRISTOPHER PULLER, OF THE INNER TEMPLE.

Ut non difficile ſit, quæcunque nova cauſa, conſultatione acciderit,
Ejus tenere jus. Cic. de Leg.

VOL. I.

19d69

LONDON:
PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.
1800.

JUDGES
OF THE
COURT OF COMMON PLEAS
During the Period contained in this Volume.

Right Honourable Sir **JAMES EYRE**, Knt. Lord Chief Juſtice.
Honourable Sir **FRANCIS BULLER**, Bart.
Honourable **JOHN HEATH**, Eſq.
Honourable Sir **GILES ROOKE**, Knt.

THE REPORTERS *having now completed the Firſt Volume of this Work, are anxious to expreſs their gratitude to all thoſe by whom they have been kindly encouraged and aſſiſted in its proſecution. In this acknowledgment they have the ſatisfaction to include every individual of the Court in which they have been employed, particularly the illuſtrious perſon who preſided on its bench during the period in which the following caſes were decided.*

May 3d, 1800.

A

TABLE

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NAMES OF THE CASES

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N. B. *Thoſe caſes, of which the names are printed in* Italics *with the letter* n. *added to the figures denoting the pages, were cited from* MS. *notes.*

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ERRATA ET ADDENDA.

Page 6. line 2. *for* Plaintiff *read* Defendant
14. — 20. *for* 683 *read* 483
26. — 9. *for* 3 T. R. *read* 2 T. R.
37. — 6. *for* obligation *read* objection
63. — 5. *for* Appleton *read* Appleby
158. — 16. *for* Plaintiff *read* Defendant
185. — 2. from the bottom *for* 727 *read* 787
288. — 23. *for* cuſtom *read* cuſtoms
194. — 26. *for* 2 Vez. *read* 1 Vez.
226. — 3. from the bottom *for* Bovier *read* Govier
229. — 3. *for* Defendants *read* Plaintiffs
50. in the margin *dele* male, and *for* in default *read* for default
252. — 28. and 29. after $\frac{1}{3}$ of *dele* $\frac{1}{4}$ *and read* $\frac{1}{5}$ and $\frac{1}{3}$ of $\frac{1}{4}$ of $\frac{1}{5}$; *and after* Arrabella's *dele* $\frac{1}{4}$
5. from the bottom *after* $\frac{1}{5}$ *dele* part *and read* $\frac{1}{3}$ of $\frac{1}{5}$ and $\frac{1}{3}$ of $\frac{1}{4}$ of $\frac{1}{5}$
266. — 2. *for* 2 H. Bl. 579. *read* 1 H. Bl. 379.
312. — 12. *for* they here *read* here they
383. in the margin *for* two *read* one and *for* one *read* two *and dele* only
434. — 17. *for* moiety *read* policy
444. — 7. *for* ſubject *read* ſubjects

From page 629 to 647, in the margin, *for* 1796 *read* 1797

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Eaſter Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

PIETERS and Another *v.* LUYTJES.

May 3d.

The Court will not diſcharge a Defendant on a common appearance under the 34 *G.* 3. *c.* 9. *ſ.* 7., on the ground of the Plaintiff's reſidence in *Holland.* An affidavit to hold to bail made by a third perſon need not ſtate a connection between the deponent and the Plaintiff.

LE BLANC Serjt. moved for a rule to ſhew cauſe why the Defendant in this action ſhould not be diſcharged on entering a common appearance, and all further proceedings be ſtayed.

The cauſe of action aroſe on an inſtrument dated the 5th *Nov.* 1794, executed by the Defendant before a notary at *Amſterdam* in *Holland*; whereby he "declared that he was well and truly indebted to the Plaintiffs *merchants of that place*, in a ſum of 9190 guilders and 3 ſtuivers, *Holland*'s current money, ariſing from and out of ſundry merchandizes ſold and delivered to him on the 30th *October* 1794, agreeably to the invoice delivered." The affidavit of debt which was made by a third perſon, ſtated that the Plaintiff at the time when the ſaid affidavit was made, was *reſident* at *Amſterdam.*

By 34 *Geo.* 3. *c.* 9. *ſ.* 1. It is enacted, that if any perſon reſiding or being in *Great Britain*, ſhall after the 1ſt day of *March*

1797.
Pieters v. Luytjes.

1794, and during the war, knowingly and wilfully pay, ſend, ſupply, or deliver, or cauſe to be paid, ſent, ſupplied, or delivered, either in *Great Britain* or *France*, or in any other country either by payment or remittance of any bill of exchange, note, draft, obligation, or order for money, or in any other manner whatſoever, any money to or for the uſe of the perſons exerciſing or who ſhall exerciſe the powers of government in *France*, or to or for the uſe of any perſons or perſon who on the 1ſt day of *January* 1794 were or was or at any time ſince have or has been, or who *at the time of ſuch act done* ſhall be within any of the dominions of *France*, or any county, territory, or place, which was on the ſaid 1ſt day of *January* 1794, or which ſhall be, during the ſaid war and at the time of ſuch act done, *under the government* of the perſons exerciſing or who ſhall hereafter exerciſe the powers of government in *France*, every perſon ſo offending, being thereof lawfully convicted or attainted, ſhall be deemed, declared, and adjudged to be a traitor, and ſhall ſuffer pains of death, and ſhall alſo loſe and forfeit as in caſes of high treaſon.

And by ſection 7th, it is further enacted, that if any action or ſuit, either in law or equity, ſhall be commenced or proſecuted for the recovery of any debt or demand, contrary to the proviſions of this act, it ſhall and may be lawful for the Court in which ſuch action or ſuit ſhall be commenced, in term time, or any one or more of the judges of ſuch court, out of term, in a ſummary way to diſcharge the Defendant or Defendants arreſted on meſne proceſs, and to ſtay all further proceedings in ſuch action or ſuit, upon ſuch terms as to ſuch Court or Judge reſpectively ſhall appear neceſſary to enforce the proviſions of this act.

It was inſiſted on the part of the Defendant, that *Amſterdam* at the time of the arreſt was under the dominion of the perſons exerciſing the powers of government in *France*, and that the Plaintiff being reſident there, this was a demand contrary to the proviſions of the above act.

Per Curiam. Can we take notice that *Amſterdam* is under the dominion of *France?* The Court will hardly receive evidence of the *influence* of *France* over *Holland:* actual poſſeſſion, as of *Flanders*, might bring a caſe of this kind within the meaning of the act. But in *Holland* there is a government *de facto*, however that government may be influenced by *French* councils.—There is no ground for the application.

Le Blanc then objected to the affidavit on which the Defendant was arreſted, becauſe it did not ſtate any connection between the deponent and the parties to the ſuit.

Sed per Curiam. It is not neceſſary for the connection to appear on the face of the affidavit. The deponent ſwears poſitively to the debt, and that is ſufficient.

Rule refuſed.

TENANT *v.* ELLIOTT.

May 5th.

A. having received money to the uſe of *B.* on an illegal contract between *B.* and *C.*, ſhall not be allowed to ſet up the illegality of the contract as a defence, in an action brought by *B.* for money had and received.

ASSUMPSIT for money had and received. Verdict for the Plaintiff.

The Defendant being a broker, effected an inſurance for the Plaintiff, a *Britiſh* ſubject, on goods from *Oſtend* to the *Eaſt Indies*, on board the *Koenitz*, an Imperial ſhip. The ſhip being loſt, the underwriters paid the amount of the inſurance to the Defendant, who, without any intimation from them to retain the money, refuſed to pay it over to the Plaintiff.

Shepherd Serjt. now moved for a rule to ſhew cauſe why the verdict in this caſe ſhould not be ſet aſide and a nonſuit entered. By 7 *Geo.* 1. *ſtat.* 1. *c.* 21. *ſ.* 2. It is enacted "That all contracts "and agreements whatſoever made or entered into by any of his "majeſty's ſubjects, or any perſon or perſons in truſt for them, "for or upon the loan of any monies by way of bottomry on any "ſhip or ſhips in the ſervice of foreigners, and bound or deſigned "to trade in the *Eaſt Indies*, or parts in the ſaid act before "mentioned; and all contracts and agreements whatſoever made "by any of his majeſty's ſubjects, or any perſon or perſons in "truſt for them, for the loading or ſupplying any ſuch ſhip or "ſhips with a cargo or lading of any ſort of goods, merchandize, "treaſure, or effects, or with any proviſions, ſtores, or neceſſaries, "ſhall be and are hereby declared to be void." Now the goods on board the *Koenitz* being the property of the Plaintiff, a ſubject of *Great Britain*, and the *Koenitz* being a foreign ſhip, bring this tranſaction within the proviſions of the above act. In *Camden* v. *Anderſon*, 6 *Term Rep.* 730. it was determined, that a policy effected in contravention of an act of parliament, made for the purpoſe of protecting the monopoly granted to the *Eaſt India* Company, was void. The voyage being illegal, makes the policy illegal alſo. If then the Plaintiff could not have ſucceeded in an action againſt the underwriters, neither can he recover againſt the preſent Defendant. The Defendant is in the nature of a ſtakeholder: and the plaintiff's right of action being grounded on his claim againſt the underwriters, he muſt now ſtand preciſely in the ſame ſituation as if he had immediately ſued them.

BULLER J. Is the man who has paid over money to another's uſe to diſpute the legality of the original conſideration? Having once waived the legality, the money ſhall never come back into his hands again. Can the Defendant then in conſcience keep the money ſo paid? For what purpoſe ſhould he retain it? To whom is he to pay it over, who is entitled to it but the Plaintiff?

EYRE Ch. J. The defendant is not like a ſtakeholder. The queſtion is, Whether he who has received money to another's uſe on an illegal contract, can be allowed to retain it, and that not even at the deſire of thoſe who paid it to him? I think he cannot.

The Defendant took nothing by his motion.

May 5th.

DYSON *v.* BIRCH, One, &c.

An attorney ſhall not be allowed his privilege, unleſs he ſhew that he has practiſed within the ſpace of a year.
Qu. If he ſhould not alſo ſtate that he has had a certificate within that time?

LE BLANC Serjt. moved for a rule to ſhew cauſe why the Defendant in this action, who was an attorney of this court, ſhould not be diſcharged on entering a common appearance.

The Defendant's affidavit ſtated, that ſome time before the arreſt he purchaſed a ſtamp, with a view to obtain his certificate, under the 25 *Geo.* 3. *c.* 80. but that from particular circumſtances (therein mentioned) he was prevented from actually obtaining it till after the arreſt.

Le Blanc. The Defendant did every thing that lay within his power, and was entitled to his privilege (if that be affected by the act at all) from the time of paying for the ſtamp. But in truth the privilege of an attorney does not depend on his certificate: the act in queſtion is a mere regulation of revenue: thoſe who offend againſt its proviſions are ſubjected to the penalties which it contains; but there is no clauſe which makes obedience a condition of privilege.

EYRE Ch. J. An application was made to me out of court, which I rejected, becauſe it then appeared, that the Defendant had not practiſed as an attorney for three years, but that when his circumſtances became embarraſſed, he took out a certificate to protect himſelf.

Buller J. My Lord very properly rejected this application. There is a rule of court of *Michaelmas* Term 1654 (*a*), that an attorney ſhall not be allowed his privilege if he has not attended his buſineſs for a year. The Defendant therefore ſhould have ſtated in his affidavit, that he had practiſed within a year previous to the arreſt.

The Court deſired that this circumſtance might be inquired into, and inſerted in an affidavit.

Buller J. The Defendant may as well alſo inform the Court, whether he has had a certificate within the year; if not, it will be a ſtrong preſumption againſt him.

This caſe was never mentioned again (*b*).

Webb *v.* Thomson.

May 6th.

Sailing orders are neceſſary to the performance of a warranty to depart with convoy, unleſs particular circumſtances exempt the inſured from the general rule.

This was an action on a policy of inſurance, tried before *Eyre* Ch. J. at *Guildhall*, Sittings after *Hilary* Term.

The policy was effected on a ſhip called *The Golden Grove*, Captain *Hodſer*, bound from *London* to the *Weſt Indies*, and warranted to depart with convoy. She ſailed from *Spithead*, the place of rendezvous, in company with a convoy under Sir *Hugh Cloberry Chriſtian*, and was afterwards wrecked on the coaſt of *Dorſetſhire*.

At the trial it was proved that the captain, and a paſſenger on board, who was ſuppoſed to have ſeen the ſailing orders, were drowned at the time of the ſhip being wrecked. The ſecond mate being examined, as to his knowledge reſpecting ſailing orders, ſtated that the captain left the ſhip *for the purpoſe of obtaining* them from the Admiral; and that afterwards on a ſignal for ſailing, the captain being aſked in what manner it ſhould be anſwered, gave the neceſſary directions. But the teſtimony of the

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(*a*) *Cook's Rules and Orders in C. B.*

(*b*) In *Routh* & Uxor v. *Weddell*, *C. B. Hil.* 2 *Ann. Lutwytche*, (the laſt caſe in the Appendix,) where an attorney pleaded his privilege, it was urged, that in the precedents in *Raſtal*, where attornies of *C. B.* brought habeas corpus, to diſcharge themſelves from arreſt by proceſs out of inferior courts, their privilege was recited to be *dum aliqua negotia in eodem banco proſequantur et defendant*; and that it was agreeable to reaſon that it ſhould be ſo, for otherwiſe many perſons who never intended to practiſe would be made attornies, in order to entitle themſelves to privilege. But it was anſwered by the Court, that as long as the Defendant was an attorney on record, he ought to have the privilege of an attorney, and that if he was not qualified to be an attorney, the Court might be moved for a rule to ſtrike him off the roll.

WEBB *v.* THOMSON.

the mate being ſhaken by Admiral *Chriſtian*'s evidence, a verdict was found for the Plaintiff.

Adair Serjt. now moved for a rule niſi for a new trial.

This caſe involves two queſtions. Firſt, whether, in point of fact, Captain *Hodſer* ever received ſailing orders; and ſecondly, whether, in point of law, the actual receipt of them be neceſſary to the performance of a warranty to depart with convoy. All the evidence of which the nature of the caſe admitted was given at the trial. The captain, whoſe teſtimony was moſt neceſſary to eſtabliſh the receipt of orders, and the only other perſon ſuppoſed to have ſeen them, were drowned. Under theſe circumſtances I ſubmit that the Court will preſume the receipt of ſailing orders. The point of law has never been expreſsly decided. Mr. Juſtice *Buller* ſeems to have queſtioned the neceſſity of ſailing orders in all caſes in *Hibbert* v. *Pigou*, *Park on Inſurances*, *p.* 341. where that point had been incidentally touched upon by Lord *Mansfield*. So in *Victorin* v. *Cleeve*, 2 *Str.* 1250. *Lee* Ch. Juſt. and the Jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy, and that thoſe agreements were never confined to the preciſe words, and the Plaintiff recovered.

BULLER J. (*abſente Eyre* Ch. J.) Had not my Lord mentioned that the verdict was entirely to his ſatisfaction, I ſhould not decide upon this application in the firſt inſtance. The caſe is here brought to a queſtion of law. In point of law then, the general propoſition is, that ſailing inſtructions are neceſſary. I have never decided this point myſelf, but it has often been determined at *Guildhall*. I do not ſay that there may not be caſes in which they may be diſpenſed with. In *Hibbert* v. *Pigou* my expreſſion is, "It is not neceſſary to ſay whether ſailing orders are eſſential or not; as at preſent adviſed, I do not ſay that they are abſolutely neceſſary." And the caſe of *Victorin* v. *Cleeve* goes no further. If the captain from any misfortune, from ſtreſs of weather, or other circumſtances, be abſolutely prevented from obtaining his inſtructions, ſtill it is a departure with convoy: but then he muſt take the earlieſt opportunity to obtain them. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with: the captain cannot anſwer ſignals; he does not know the place of rendezvous in caſe of a ſtorm; he does not in effect put himſelf under the protection of the convoy, and therefore the underwriters are not benefited.

The other Judges concurring,

The Plaintiff took nothing by his motion.

In a note, inſerted in the laſt edition of *Park on Inſurances*, p. 341. the following caſe is mentioned, which ſeems to agree in principle with the above deciſion. It was the caſe of *Veedon* v. *Wilmot*, at *Guildhall*, 1744, in the time of Lord Chief Juſtice *Lee*, where the ſhip inſured had departed from *London*, and arrived at the *Downs* 22d *Auguſt* where the *Grafton* and *Lenox* (the convoy) were under ſail, and the captain ſent one of his men on board for ſailing orders, which were refuſed; but the Commodore ſaid, "*Keep on, and I* "*will take care of you*;" and the ſhip being loſt that night by ſtriking on the ſhore, the queſtion was, if the ſhip was put under convoy, *having no ſailing orders?* and it was held ſhe was, and the Plaintiff had a verdict.

Baptiste *v.* Cobbold.

May 8th.

Declaration for 52*l.* 10*s.* for run-money; evidence, a note for 52*l.* 10*s.* for run-money, with an additional ſtipulation written after ſignature of the note, for a pint of rum *per* day, and held no variance.

The plaintiff in this action was a ſailor, and declared on a contract for 52*l.* 10*s.* for run-money, againſt the Defendant, being captain of a ſhip bound from the *Weſt Indies* to *London*.

At the trial, before *Eyre* Chief Juſtice, at *Guildhall*, Sittings after *Hilary* Term, a note was given in evidence, by which the Defendant agreed to allow the Plaintiff the above ſum; *together with a pint of rum* per *day*; the latter part of the agreement however, appeared to have been added to the note after ſignature. Verdict for the plaintiff.

Cockell Serjt. now moved for a rule niſi, to enter a nonſuit. He relied on a variance between the declaration and the evidence; the former deſcribing a contract for 52*l.* 10*s.* only, and the latter proving the additional ſtipulation for a pint of rum *per* day. He contended that the contract, being entire, could not be ſeparated; he cited *Sands* and *Taſh* v. *Ledger*, *Ld. Raym.* 793. and *Briſtow* v. *Wright*, *Dougl.* 640., and ſaid that this caſe fell within the principle of a variety of others.

Buller J. The agreement given in evidence correſponded with the declaration, as far as the declaration went. The caſe in Lord *Raymond* turned upon the deſcription of a written agreement, which, if deſcribed at all, muſt tally with the deſcription; here no written agreement was deſcribed. It is true that the agreement given in evidence contained ſomething more than was ſtated in the declaration, but not material to it.

Eyre Ch. J. At the trial, I was inclined to conſider the latter promiſe as no part of the agreement; it was totally different from the main body, which was ſo executory, that nothing was to ariſe upon it till the voyage was complete; whereas this part was to be put in force from day to day, and determined before this cauſe of action aroſe. Beſides, the addition was made after ſignature,

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nature, and ſeemed to be inſerted merely to aſcertain what quantity of rum ſhould be diſtributed to the crew.

The Defendant took nothing by his motion.

May 9th.

DE GAILLON *v.* VICTORIE HAREL L'AIGLE.

A *Frenchwoman*, and her huſband, come over to *England*. The huſband gives her a power of attorney, to tranſact his buſineſs, and goes to *Hamburgh*. She cohabits with another man, and trades on her own account with the Plaintiff, by whom ſhe is arreſted. Under theſe circumſtances, the Court will not diſcharge her on a common appearance, on the ground of her coverture, although the Plaintiff appear to have been acquainted with it.

SHEPHERD Serjt. having obtained a rule to ſhew cauſe, why on the Defendant in this action entering a common appearance, the bail-bond ſhould not be ſet aſide, and all further proceedings againſt the ſheriff of *Middleſex* be ſtayed, it came on this day.

In *November* 1792, the Plaintiff M. *De Gaillon*, a M. *L'Aigle*, and the Defendant Madame *L'Aigle* his wife, came over together as emigrants from *France* to *England*. In *July* 1795, M. *L'Aigle* left *England* for *Hamburgh*, and then gave a power of attorney to the Defendant to manage his affairs. In purſuance of which ſhe drew and accepted bills for him. Since the huſband's reſidence in *Hamburgh*, he had carried on buſineſs with the houſe of *Dubois* and ſon in *London*, and the Defendant had cohabited *with another perſon* of the name of *Montelun*, who called himſelf *Piccardi*, by whom ſhe had a child, and with whom ſhe had been carrying on trade. In *June* 1796, the Plaintiff wrote the following letter to the Defendant: "Will you, or can you "procure me merchandize for 700*l.* as ſoon as poſſible; I will "ſend you immediately 300*l.* on account, and I will ſend your "huſband goods to the amount of 600*l.* to *Hamburgh;* and in "return he will ſend me *French* goods to that amount, ſuch as "brandy, hollands, or what he may think moſt advantageous "to me." Soon after this the Plaintiff depoſited 300*l.* in the hands of the Defendant, for which ſhe gave him a receipt *in her own name*. The Plaintiff having obtained no goods, preſſed the Defendant to repay the 300*l.* which he had advanced, upon which the following arrangement took place. The Defendant gave the Plaintiff 100*l.* in goods, and four bills on her huſband, for 50*l.* each; the bills were in form as follows:

"One month after date, pleaſe to pay to the order of M. *De* "*Gaillon*, 50*l.* ſterling, value received.

(Signed.) "Wife *Harel L'Aigle*, by virtue "of power of attorney."

DE GAILLON *v.* VICTORIE HAREL L'AIGLE.

M. *L'Aigle* accepted the bills, but on their becoming due refuſed to pay; on which they were returned to *England* proteſted, and the Defendant was arreſted for the ſum of 180*l.*, being the balance due to the Plaintiff on the whole tranſaction.

The Defendant ſtated in an affidavit the Plaintiff's knowledge of her coverture at the time of her coming over to *England*: the Plaintiff, on the contrary, denied in his affidavit any intimate acquaintance with M. *L'Aigle*, and declared that he had reaſon to ſuppoſe from the Defendant's conduct in *England*, that in fact ſhe was not married to him.

Le Blanc Serjt. ſhewed cauſe. Where it has been known for certain that the Defendant was a married woman, the Courts have diſcharged her (*a*); but where it has been doubtful, or colluſion has appeared, they have put her to her plea of coverture, and let the queſtion be tried; and this I apprehend they will do, where the money is advanced to her on her own account. She has not ſtated in her affidavit that her huſband is likely at preſent, or ever, to return to *England*. The letter of attorney from M. *L'Aigle* was only colourable.

Shepherd Serjt. in reply. Had this been a ſeparate trade by the Defendant, I could not have argued the queſtion. The Plaintiff's affidavit conſiſts of inferences only, which are contradicted by his own acts, and letter. He cannot ſay that he did not ſuppoſe the Defendant married, as his own expreſſion in the letter "I will ſend "to your *huſband*" would refute that aſſertion. He therefore dealt with her rather as an agent than as a ſeparate trader. The Defendant did not draw the bills as a feme ſole, but ſigned them "Wife *H. L'Aigle*," and the Plaintiff received them, and never brought this action till the bills were returned proteſted from *Hamburgh*. If the party has paſſed herſelf upon the world as a ſingle woman, the Court will give her no relief; but if ſhe was known to be married, it is otherwiſe. *Pearſon* v. *Meadon*, 2 *Bl. Rep.* 903. So in *Waters* v. *Smith*, 6 *Term Rep.* 452. the Court ſaid, "Though when a married woman impoſes on a trader, and "contracts on her own credit, we will not relieve her in a ſum-"mary way; yet where it has clearly appeared that the Defend-"ant was a feme covert, and there has been no contrariety of "evidence about that fact, the Court has diſcharged her out of "cuſtody on filing common bail." Here the Plaintiff knew that ſhe was married, and employed her to tranſact buſineſs with her huſband. Therefore it is her huſband's, and not her debt.

(*a*) *Partridge* v. *Clarke*, 5 *Term Rep.* 194.

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EYRE Ch. J. In my apprehenſion you miſtake the evidence. The letter contains two diſtinct tranſactions. In the firſt part, the Plaintiff deſires the Defendant to ſupply him with goods to the amount of 700*l.*, for which he promiſes to advance 300*l.* immediately; and this has no connection with the huſband. Then in the ſecond part, he ſtates his intention of ſending goods to the huſband at *Hamburgh*, for which he expects an adequate return. The Plaintiff obtained 100*l.* from the Defendant in goods, and bills for 200*l.*, making in the whole 300*l.*; the ſum in which ſhe, as acting for herſelf, was indebted to him. To whom then was the Plaintiff creditor? He was creditor to the huſband in one caſe, for 600*l.* which he had ſent to *Hamburgh*, and for which the huſband was to return 600 *l.*, and as I underſtand, he did ſo. To the wife, the Plaintiff had advanced 300*l.*, and not receiving the goods which he had deſired, to the amount of 700*l.*, required ſecurity. She gave him 100*l.*, and bills; and on the bills being proteſted, he arreſted her. This laſt tranſaction was with her, not with the huſband; the Plaintiff having advanced the money on that trade which ſhe was carrying on in *England*. I cannot but conſider that theſe parties came from *France*, where it is not unuſual for the wife to deal ſeparately from the huſband. In this caſe the huſband reſided at *Hamburgh*, ſhe lived with another man, and he made no objection. She muſt therefore be reſponſible for her own trading, and ſhould not be allowed to ſhelter herſelf under the name of her huſband, who is in a foreign country.

BULLER J. We are not called upon to decide whether the Defendant be married or not. It may happen that her coverture may be a good defence. Theſe caſes afford no general rule. They turn on nice circumſtances. If the 300*l.* had been advanced on the huſband's account, I ſhould have wiſhed the Court to interpoſe; but ſhe took it for her own uſe. The huſband had no connection with her trading. The obſervation of my Lord, that theſe parties are *French*, is very material. In *France* married women have many rights, which are allowed to none but ſingle women in this country. If ſhe received the 300*l.* on her own account, ſhe is entitled to no favour. A diſcharge is a favour; and the queſtion now is, Whether we are to grant a favour or not? If ſhe can prove a marriage at the trial, it may be a defence at law. Let her put her coverture on the record.

HEATH J. The Plaintiff took the bills from the Defendant, drawn by procuration, as the only ſecurity which he could obtain for his debt. But the money was originally advanced to her as a feme ſole.

Rooke J. On the opening of this queſtion I wiſhed for further diſcuſſion, but on diſcuſſion am entirely ſatisfied. Let her plead her coverture.

Rule diſcharged.

In *Pritchett qui tam* v. *Rachel Croſs*, 2 *H. Bl.* 18. where a rule for diſcharging a feme covert, who reſided apart from her huſband, was made abſolute, *Gould* J. ſeemed to diſapprove of the ſummary proceeding by motion, and of taking the fact of coverture from the Defendant's affidavit. He mentioned the caſe of Mrs. *Baddeley*, 2 *Bl.* 1079. where the Court were not ſatisfied with an affidavit, but put her to plead her coverture; and he ſaid he had always underſtood that ſuch was the courſe both in *K. B.* and *C. B.*

Keay and Another, Aſſignees of Taylor a Bankrupt, *v.* Rigg.

19th *May*.

The Court will not refuſe leave to enter a ſuggeſtion under the 22 *G.* 2. *c.* 47. on the ground that a Court of Conſcience has no authority to try a queſtion of bankruptcy.

Shepherd Serjt. on a former day obtained a rule to ſhew cauſe why the Defendant in this caſe ſhould not be at liberty to enter a ſuggeſtion on record, purſuant to the 22 *G.* 2. *c.* 27., of his being an inhabitant and reſiant within the pariſh of *St. Mary, Lambeth*, and liable to be ſummoned for the debt for which this action was brought before the Court of Requeſts for the Town and Borough of *Southwark* in the County of *Surry*, and that the damages recovered in this action did not amount to the ſum of 40*s.*; and why the Plaintiffs ſhould not loſe their coſts in this action, and pay to the Defendant his coſts in this action, and alſo of this application.

The Plaintiffs declared as aſſignees for tailors work done by the bankrupt, and the cauſe was tried before *Rooke* J. at the ſittings at *Guildhall* after laſt *Hilary* term. The original demand (which had never been objected to till the action was brought) was 2 *l.* 1 *s.*; but the jury found a verdict for 1 *l.* 16 *s.* only.

Adair Serjt. now ſhewed cauſe. My objection is ſingly this, that the Court of Requeſts has no authority to try a queſtion of bankruptcy. There is no deciſion, I believe, upon the point; I muſt therefore ſubmit it to the Court on the nature and reaſon of the caſe. The words of the ſtatute which gives the juriſdiction are cautious; they are "touching ſuch debts." The intricacy attending queſtions of bankruptcy is well known, and how unfit the courts erected by this and ſimilar ſtatutes are to try them. It would

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Keay v. Rigg.

would be dangerous to thoſe commercial cities in which courts of this nature are eſtabliſhed, if it were in the power of every one to draw queſtions of bankruptcy before ſuch tribunals, by laying the damages under 40*s.* I contend therefore that the *words* of the ſtatute do not bind the Court to an inconvenient conſtruction, and that the ſilence of an act ſhould not (as is ſometimes the caſe) be carried too far.

Shepherd contrà. The Plaintiffs in this caſe are perſonal repreſentatives; now though an executor Defendant cannot be ſued in theſe courts, *Ailway* v. *Burrows*, *Doug.* 263. yet a Plaintiff adminiſtrator is bound to ſue in them, *Waſe* v. *Wyburd*, *Doug.* 246. In the Court of Conſcience act for *Middleſex*, 23 *G.* 2. *c.* 33. *ſ.* 19., if the damages are leſs than 40*s.* the Plaintiff can have no coſts, unleſs the judge certify that the bankruptcy, or title to the freehold, came principally in queſtion; the Legiſlature therefore conſiders bankruptcy within the cognizance of theſe courts, and unleſs excepted by the ſtatute eſtabliſhing the court in queſtion, it falls of courſe within its juriſdiction.

Eyre Ch. J. It might have been prudent in the Legiſlature to have made the exception contended for. But if a general juriſdiction be given, the trial of bankruptcy is incidental to it. The Plaintiff muſt make out his claim before theſe tribunals, however that claim may be conſtituted; though bankruptcy, or any other queſtion, ſhould happen to be connected with it. Many intricate points may be incidental to a defence, in which caſe theſe courts muſt do as well as they can: the preſent objection is only quarrelling with the juriſdiction of the court.

The words "touching the debts" are very extenſive. The juriſdiction is general, and it is incumbent on the Plaintiff to ſhew an exception. My brother *Adair* complains of the ſilence of an act being carried too far, but here he wants to inſert an exception not warranted by the act itſelf: that is making the act ſpeak. The caſe is not of that importance which has been ſtated: queſtions of bankruptcy ſeldom lie in ſo narrow a compaſs as 40*s*; nor are they in general very intricate. It would be cruel to make ſuch ſmall debts as ariſe on bakers' bills, and milk ſcores, the ſubjects of litigation in the ſuperior courts, becauſe a queſtion of bankruptcy is involved.

Buller J. ſeemed to think that there were authorities on the ſubject, and wiſhed them to be looked into. He ſaid that if an action would not lie in theſe courts for a debt ariſing in conſequence of a judgment of a court of law, perhaps it might not for a debt ariſing in conſequence of the deciſion of the commiſſioners of bankrupt, who have an equitable juriſdiction.

Leave was given to enter the ſuggeſtion, unleſs any authorities ſhould be produced.

On the 19th, *Adair* again mentioned the caſe of *Ailway* v. *Burrows*, as containing a principle which would ſupport his argument. There Lord *Mansfield* held, that although there were no expreſs exception, yet if one were implied from the nature and reaſon of the thing, it was ſufficient. If that were ſo, the inſtance cited of acts containing expreſs exceptions furniſhed an argument to prove that ſuch a juriſdiction was againſt the reaſon of the thing. Taking all the acts together they appeared to form one code of legiſlation, and queſtions of bankruptcy being excepted by 23 *Geo.* 2. *c.* 33. *ſ.* 19. they were excepted in all.

Rooke J. In that act, bankruptcy is not excepted, unleſs the judge certify that it came principally in queſtion, and no certificate could be expected in the preſent caſe.

Eyre Ch. J. Even under that act the local courts have juriſdiction over the excepted matters, if the parties think proper to apply to them, but if they apply to the ſuperior courts, they ſhall be protected; provided a certificate be made, that thoſe matters came principally in queſtion; for the object is not to withdraw any juriſdiction from the local courts. It would be much better that debts under 40*s.* ſhould be given up, than that they ſhould be ſued for in the ſuperior courts.

Leave given to enter the ſuggeſtion.

In the Exchequer Chamber.

May 10th.

Kirby and Another *v.* Sadgrove, in Error.

If the lord of the manor plant trees on a common, a commoner has no right to abate them.

Error from the Court of *King's Bench*. The declaration there was in treſpaſs, for cutting down the trees of the Plaintiff below, growing in the pariſh of *South Moreton* in the county of *Berks*. Plea: That the trees grew in a certain common field in the ſaid pariſh, and that one *F. K.* was ſeiſed in his demeſne as of fee, in a certain farm in the ſaid pariſh, and preſcribed for a common of paſture for his ſheep, levant and couchant, throughout the ſaid common field, in reſpect of ſuch eſtate for himſelf, his tenants, &c. every year when the common field ſhould be ſown with corn, from the cutting down and carrying away the ſame, until the ſaid common field ſhould be re-ſown with corn. It then ſtated a demiſe of the ſaid eſtate from *F. K.* to *Kirby* the Defendant below, in right of which he entered upon the ſame, and becauſe the ſaid trees at the time when, &c. had been wrongfully planted, and were wrongfully growing upon the ſaid common field, incumbering the ſame and damaging, &c. ſo that *Kirby*, the Defendant below, could not without cutting down the ſame, enjoy his common of paſture *in ſo ample and beneficial a manner as he otherwiſe might and ought to have done*; he in his own right, and the other Defendant below, as his ſervant, and by his command, cut down the ſaid trees, &c. Replication: That the ſaid common field whereon the trees were growing, was parcel of the contiguous manors of *Sandeville* and *Bray* in the county of *Berks*, and of the waſtes thereof, and that the Plaintiff below was *Lord of the manors*, and that he planted the ſaid trees, &c. To which there was a general demurrer and joinder: and judgment for the Plaintiff below. For the former arguments in this caſe ſee 6 *Term Rep.* 683.

Shepherd Serjeant for the Plaintiff in error. The replication does not deny the allegation that the trees were an interruption to the enjoyment of the commoners right, in as ample a manner as he was entitled to exerciſe it; and is bad becauſe it does not ſtate that the lord left a ſufficiency of common, which queſtion ought to have been put in iſſue and tried. I mean to contend, that when the lord does an act by which the right of the commoner is not totally deſtroyed but only partially interrupted, he may equally take his remedy by abating the nuiſance, and is not confined to his action for damages, as argued on the other ſide. A right to common without a ſufficiency would be a nugatory right. The *Statute of Merton*, 20 *Hen.* 3. *c.* 4. *Statute of Weſtminſter* 2. 13 *Ed.* 1. *c.* 46. and 3 & 4 *Ed.* 6. *c.* 3. eſtabliſh three rights; ingreſs, egreſs, and ſufficiency of common when on the common; and theſe are deſcribed as three things which the lord ſhall not infringe. The words of the *Statute of Merton* are, "Whenever ſuch feoffees do "bring an aſſize of novel diſſeiſin for their common of paſture, "and it is acknowleged before the juſtices that they have as much "paſture as ſufficeth to their tenements, and that they have free "egreſs and regreſs from their tenement unto the paſture, then let "them be contented therewith." Sufficiency of common is the right, and ingreſs and egreſs are the means of enjoying it. The diſtinction of the other ſide admits that the commoner has a right to aſſert by his own act ingreſs and egreſs, but not the actual enjoyment of a ſufficiency of common. For it is allowed that if the lord plant a hedge, or build a wall, ſo as totally to exclude a commoner from the exerciſe of his right, he may abate the nuiſance. The reaſon is given by Lord *Mansfield* in *Cooper* v. *Marſhall*, *Burr.* 265. "Becauſe every ſuch obſtruction is directly contrary "to the terms of the grant; a hedge, a gate, or a wall to keep the "commoner's cattle out, is inconſiſtent with the grant which gives "them a right to come in." On the ſame principle I contend, that when the lord erects any thing, whether hedge, gate, houſe, or tree, which deſtroys either of the commoners three rights, he may abate it. In every other caſe of nuiſance, whether totally or partially deſtroying the parties right, he may abate, as in 5 *Co.* 101. *b.* *Penruddock*'s caſe, 9 *Co.* 55. *Batten*'s caſe; and this is a general propoſition, relating not only to property in poſſeſſion, but to rights. As in the caſe of a water-mill, the owner of the mill having a right to the water of a water-courſe, may, if the water be ſtopped in another's lands, enter thoſe lands and remove the dam. So if a way be ſtopped, he who has the right of way may abate the ſtoppage, whether it be total or partial. (*Eyre* Ch. J. ſaid there was a diſtinction taken in *Fitz. N. B. p.* 183 in the note. "If "a way be ſo ſtopped, that the party can paſs but narrowly, an "action on the caſe lies; but if it be wholly ſtopped, an aſſize, "14 *H.* 4. 31.") A diſtinction has been attempted between an act illegal in itſelf and an exceſs; but this would make treſpaſs almoſt eſſential to conſtitute a nuiſance, which it is not; the term nuiſance is not applicable to the mode of doing the thing, but to the thing done, and to its effect on another. If the lights of a houſe be obſtructed, ſo that the poſſeſſor is prevented from enjoying *in tam amplo modo*, he may abate what cauſes the obſtruction. See Sir *William Jones* 222; thus in *Rex* v. *Pappineau*, 1 *Str.* 688, which was an indictment for a nuiſance, Lord *Raymond* ſaid, "Regularly the judgment ought to be to abate ſo much of the "thing as makes it a nuiſance; if a houſe be built too high, ſo "much of it as is too high ſhall only be abated." In *Penruddock*'s caſe the nuiſance was clearly only partial, and it was held that the party might abate. If there can be no abatement in this caſe, the lord may incloſe almoſt all the common, not perhaps leaving enough for an hundred ſheep, or even for one, or he might build a town on the common, and yet there could be no abatement. In

Bro. Abr. title Common, Pl. 9. it is ſaid, "Where I have common "in another's land, and the owner makes a hedge on the land where "the common is, I may break down the whole hedge; but if he "encloſes the whole land in which the common is, by making a "hedge on other land which ſurrounds the land in which the "common is, I may *not* break down the whole hedge, but only "part, ſo as to have a way to the land where the common is, and "this is the diverſity." So *Co.* 2 *Inſt. p.* 88. "If the lord doth "incloſe any part, and leave not ſufficient common in the reſidue, "the commoner may break down the whole incloſure, becauſe "it ſtandeth on the ground which is his common." See alſo 29 *Ed.* 3. 6. Now this proves that the commoner may abate a nuiſance on the common, as well as one obſtructing his way to the common, only confining his abatement to the extent of his injury. The facts of this caſe do not vary the principle. Upon the record it muſt ſtand confeſſed that the lord infringes the right of common *tam amplo modo.* He does not ſay, I did this act as lord, and left a ſufficiency, which he ought to do, for otherwiſe he does not ſhew, that he has planted legally. In *Maſon* v. *Cæſar*, 2 *Mod.* 66., the commoner did not ſtate that he was deprived of his enjoyment *altogether*, but only *in eâ parte* where the hedges ſtood, and ſo juſtified pulling them down; and the iſſue was, whether he could enjoy *tam amplo modo*, &c. and judgment was given for the commoner. This warrants my argument; for it is the ſame thing whether a hedge or a tree be planted on the common. (*Buller* J. Are you aware that *Maſon* v. *Cæſar* was decided on the point that the hedge was no part of the ſoil.) Meddling with the ſoil or not does not decide the queſtion; if it did, it would equally apply where the obſtruction was total as where it was partial. For in both caſes the lord is equally entitled to the ſoil, and in the latter the commoner's right to abate has been acknowledged. As in 29 *Ed.* 3. 6. where the defendants juſtified cutting down trees, becauſe they were planted in a hedge which deprived them of ingreſs to the common. It is true that there are ſeveral caſes (*a*) to ſhew that a commoner has no right to deſtroy the beaſts or coney-burrows of the lord, though they do not leave him a ſufficiency of common; and the reaſon why abatement is not there allowed, is becauſe the beaſts and conies are only in the nature of a ſurcharge. A free warren is compatible with a right of common: but the right exerciſed here is incompatible. An erection

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(*a*) *Cope* v. *Marſhall*, 2 *Wilſ.* 51. *Cooper* v. *Marſhall*, *Burr.* 259. and the caſes there cited.

by the lord is no enjoyment of the common *quà* common, but is rather a ſubſtraction of the common itſelf. In the caſe of free warren the commoner may not redreſs himſelf; for though his right and that of the lord are not of the ſame nature, the modes of enjoyment are. A ſurcharge is not a continued nuiſance, but an erection is: to confine the party therefore to an action, would be to give him a perpetual right of action. Suppoſe the commoner were to bring an aſſize of nuiſance, he would then have a right to abate after recovery: then why ſhould he not as well abate before? for the reaſon for abatement given in the books is to prevent a multiplicity of actions. There is no diſtinction in principle, between *deſtroying* the enjoyment of a right and *preventing* the enjoyment *tam amplo modo*. There are caſes where total and partial obſtructions of rights have been conſidered as equally abateable; and I have found none the other way but thoſe relating to free warren.

Williams Serjt. for the Defendant was ſtopped by the Court.

Eyre Ch. J. This caſe is governed by that of *Cooper* v. *Marſhall* unleſs a good diſtinction can be ſtated between them. A tree is not an erection on the ſoil; it is the very fruit and produce of the ſoil, it is part of the ſoil and freehold itſelf, and does it not paſs as ſuch? In public ways you might abate a tree, becauſe it would *neceſſarily* be a nuiſance. But in caſes like the preſent, it will be a nuiſance or not, according as it injures the eaſement or not. This caſe has been argued as if it were a caſe of approvement under the *Statute of Merton*; but in fact it is no ſuch thing. The right here exerciſed by the lord is an original right in the ſoil, prior to that of common, which is only concurrent with it. But where there is a right of common the lord's right muſt be ſo exerciſed as not to injure the commoner. If the lord ſo uſe it as to *deſtroy* the eaſement, ſuch an act would be conſidered as a nuiſance, and abateable. If the eaſement be injured to a certain degree only, or if it may be a queſtion whether injured or not, in the nature of things it cannot be a ſubject of abatement. The eaſement in queſtion is a right of paſture over the whole ſoil, conſiſtent with a free warren in the lord, and, as I think, with a right to plant. If the eaſement be injured, the commoner may bring his action and have ſatisfaction in damages. Even where the right of common is totally deſtroyed, and the commoner may, generally ſpeaking, abate the nuiſance; yet if he cannot abate it without interfering with the right of ſoil in the lord, he muſt not purſue that remedy. We cannot overturn the caſe of *Cooper* v.

Marſhall. Indeed we ought to adhere to it, not only as founded in principles of law, between the commoner, and his lord, but alſo in principles of general convenience. Abatement ought to be allowed in very few caſes; for the abator is judge in his own cauſe. The juſt meaſure of damages ſuſtained will be beſt found by an action. Unleſs the cleareſt analogies compel us to pronounce in favour of abatement, there can be no reaſon to ſtrain a point in order to give that remedy. It is a remedy in addition to that given by action, and ought to be allowed but ſparingly. I think the caſe of *Cooper* v. *Marſhall* deciſive.

Judgment affirmed.

May 11th.

CROWDER *v.* WAGSTAFF.

The Court will not give leave to compound in a penal action, after verdict, unleſs the Defendant can ſhew circumſtances which entitle him to ſuch an indulgence.

LE *BLANC* Serjt. moved for leave to compound in a *qui tam* action after verdict on the uſual affidavit, ſaying that the ſame had been done by conſent in the King's Bench (*a*).

Shepherd Serjt. on the part of the Plaintiff conſented.

Sed per EYRE Ch. J. What caſe do you make for ſuch indulgence? We cannot pay attention to the conſent of the plaintiff, after verdict. I do not know that the Court can do this without the conſent of the Attorney General. It is no longer compounding; the debt is aſcertained, the ſuit is at an end, and the Crown may intervene. Here the affidavit ſtates no circumſtances to entitle you to this indulgence, if we are at liberty to grant it; at leaſt you ought to ſtate a caſe of favor. You muſt pay the whole money into Court (*b*).

(*a*) The caſe alluded to by *Le Blanc* probably was *Maughan* v. *Walker*, 5 *T. R.* 98. but there favorable circumſtances, were ſtated on the part of the Defendant.

(*b*) In *Bradſhaw* v. *Mottram*, 1 *Str.* 167. the Plaintiff obtained the leave of the Court, to compound with the Defendant who was then in execution, on an affidavit of his poverty.

SPENCER *v.* SCOTT.

May 11th.

Quare clauſum fregit againſt two, and a declaration againſt one, held regular.

SHEPHERD Serjt. ſhewed cauſe againſt a rule obtained by *Runnington* Serjt. on a former day, to ſet aſide the proceedings in this action for irregularity, with coſts.

The Plaintiff had ſued out a *quare clauſum fregit* againſt *Walter Scott* and *Richard Shaw*, and had declared againſt *Scott* only.

Shepherd. When on the face of the writ, the action appears to be founded on a contract, and two perſons are there mentioned, the declaration muſt be againſt both; but where the writ does not import a contract, it is otherwiſe. Almoſt all writs are againſt two, the name of *John Doe* being generally inſerted with that of the real Defendant, and the Court will not now for the purpoſes of this rule, take notice that *Richard Shaw* is not a fictitious perſon.

Runnington in ſupport of the rule. I know of no ſuch diſtinction, as has been ſtated; if the declaration be againſt one, and the writ againſt two, the proceedings are irregular; and even upon the above diſtinction, it may be obſerved here, that though the writ was a *quare clauſum fregit*, the notice of declaration was debt on contract.

EYRE Ch. J. My brother *Shepherd* ſtates it to be the practice to put any names into the writ, as *John Doe*; which is very intelligible; the writ here is only the proceſs by which this Defendant was brought into Court, and the notice of declaration given afterwards is right. If *John Doe* be ever joined in the writ with the real Defendant, it follows that proceedings are not to be ſtayed becauſe two names appear in the writ, and one only in the declaration; for *John Doe* is never inſerted in the declaration.

Rule diſcharged without coſts (*a*).

(*a*) See poſt. *Stables* and Another v. *Aſhley* and Others (laſt caſe in this term).

1797.

May 12th.

EVANS *v.* WEAVER.

In an action on a promiſſory note, the Court will not change the venue from *London* to the county where it was made, on the Defendant's ſtating that *all* his witneſſes live there: but if his affidavit ſhew the number of his witneſſes, and that a ſerious inconvenience would ariſe from bringing them up, it will.

THIS was an action on a promiſſory note for 40*l.* in which kind of action the general rule is, that the Defendant cannot change the venue.

Williams Serjt. having obtained a rule to ſhew cauſe why the venue ſhould not be changed from *London* to *Shropſhire*, on an affidavit that the Defendant had a good defence at *Ludlow* in *Shropſhire*, and that all his witneſſes lived there, as well as the uſual affidavit,

Clayton Serjt. for the Plaintiff. All the allegations in the Defendant's affidavit may be true, and yet there may be no ground for the preſent application. For perhaps he may have only one witneſs at *Ludlow*, and then it may be more inconvenient for the Plaintiff to carry down his witneſſes than for the Defendant to bring up his.

Williams for the Defendant. It is not the firſt time (*a*) that an application has been made on the ground of the Defendant's witneſſes living at a diſtance. The only queſtion is, whether the Court ſhall deviate from the uſual practice, and I ſubmit that where the affidavit diſcloſes circumſtances ſingular or extraordinary it will.

Per Curiam. The Defendant only ſwears that he has a good defence, and that all his witneſſes live at *Ludlow*; but he does not ſtate what are the grounds of his defence, nor whether he has one, two, or three witneſſes, or how many. If he had a number of witneſſes all living there, and he were to ſtate that on his affidavit, and ſhew that a ſerious inconvenience would ariſe from bringing them up, it might induce the Court to deviate from the general rule. But if the Defendant ſhould have one witneſs only, the Court would hardly change the venue on account of that one. It might be more expenſive to the Plaintiff to carry down his witneſſes to *Ludlow*, than for the Defendant to bring up his to *London*. It will be eaſy to ſtate the circumſtances on an affidavit.

On the 19th *Williams* produced a ſupplemental affidavit, ſtating that the defence on which the Defendant intended to rely, was a ſet-

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(*a*) See *Foſter* v. *Taylor*, 1 *T. R.* 781. where the venue was changed under ſimilar circumſtances; *e contrà*, *Bevis* adminiſtratrix v. *Moore*; *Pole* v. *Horobin*, and *Flecke* v. *Godfrey*, in a note to the above caſe.

ſet-off for money paid, lent, had, and received, and account ſtated; that he had three witneſſes living at *Ludlow*, all of whom were eſſential to eſtabliſh his defence; that it would be neceſſary to prove a judgment for 4*l.* 5*s.* in the town-court of *Ludlow*, (which however the Plaintiff offered to admit,) and that this application was not made for the purpoſe of delay.

On which the rule was made abſolute, the Defendant conſenting to allow judgment to be entered up as of *Trinity* term, in caſe of a verdict for the Plaintiff at the aſſizes.

Neat *v.* Allen.

May 15th.

It is no objection to bail that they are indemnified.

The bail in this action being brought up to juſtify, *Shepherd* Serjeant aſked one of them, how long he had known the Defendant? But the Court thought the queſtion improper. And on *Shepherd*'s ſuggeſting that the bail had not been acquainted with the Defendant above three or four days, and that he was *indemnified* by the ſheriff's officer,

Per Curiam. The ſufficiency of the bail is the object of which the Court are to take care: there is no impropriety in their being indemnified: it is a very common practice.

Bail allowed.

Taylor *v.* Shum and Others.

May 16th.

There is no fraud in the aſſignee of a term aſſigning over his intereſt, to whom he pleaſes, with a view to get rid of a leaſe, although ſuch perſon neither takes actual poſſeſſion, nor receives the leaſe.
Qu. If the replication *per fraudem* by the leſſor, to a plea of aſſignment in ſuch a caſe, can ever be good? Certainly not, where the party aſſigning derives no benefit from the premiſes.

Debt for rent againſt the aſſignees of a term.

Pleas. Firſt, That the term eſtate and intereſt in the premiſes did not come to the Defendants by aſſignment: and iſſue thereon. Second, That the Defendants did not by virtue of any ſuch aſſignment, enter into and become poſſeſſed of the premiſes: and iſſue thereon. Third, That before the rent demanded, or any part of it became due and payable, the Defendants aſſigned to one *William Biſhop*.

Replication. That the ſaid ſuppoſed aſſignment to the ſaid *William Biſhop* in the third plea mentioned, was had and made by the ſaid Defendants, by the fraud and covin of the ſaid Defendants, with intent to defraud the ſaid Plaintiff of her ſaid debt: and iſſue joined thereon.

TAYLOR *v.* SHUM and Others.

The premiſes in queſtion were demiſed in the year 1788 by the Plaintiff to one *Hannah Adams*, for twenty-one years, and afterwards came by ſeveral meſne aſſignments to one *Sibley;* in the year 1792 *Sibley* mortgaged the leaſe to the Defendants, who, on his becoming inſolvent, and abandoning the premiſes, took poſſeſſion, and paid the rent up to *Chriſtmas* 1795; at which time they offered to ſurrender the premiſes to the Plaintiff, and on his refuſal to accept, aſſigned over to *William Biſhop:* ſince that time the Defendants had neither enjoyed the premiſes nor paid any rent: nor had *Biſhop* taken poſſeſſion, or received the leaſe.

This cauſe came on to be tried at the ſittings after laſt *Hilary* Term in *London*, before *Eyre* Ch. J., when a verdict was found for the Plaintiff, with leave for the Defendants to move to ſet it aſide and enter a nonſuit.

Accordingly *Le Blanc* Serjt., having on a former day obtained a rule to ſhew cauſe, and cited the caſe of *Le Keux* v. *Naſh*, *Str.* 1221. where an aſſignment to a priſoner in the *Fleet* was held good,

Shepherd Serjt. for the Plaintiff now produced an affidavit, ſtating that the Defendants had informed the Plaintiff that *William Biſhop* the aſſignee lived in *Harp Lane;* but that although upon inquiry one or two perſons of that name were found there, yet they had no knowledge of the aſſignment. He admitted that the Defendants might ſelect a pauper for the purpoſe of aſſigning over to him, but inſiſted that there muſt be a good and valid aſſignment, ſo as to give the ſame remedy againſt the pauper as might have been had againſt the Defendants, otherwiſe the execution would be fraudulent. That if this were not the caſe they might have aſſigned to a non-entity. (*Buller* J. If they execute to a non-entity it is no aſſignment.) He contended that the Defendants had not legally deveſted themſelves, for they had not made ſuch an aſſignment as would bind the aſſignee, he never having had poſſeſſion of the premiſes, or delivery of the leaſe. He cited *Philpot* v. *Hoare*, *Ambl.* 485. where an improper deſcription of the reſidence of the aſſignee was one of the grounds on which the aſſignment was held fraudulent.

Le Blanc contrà was ſtopped by the Court.

EYRE Ch. J. It was no part of the caſe at the trial that there was no ſuch perſon in exiſtence as the perſon deſcribed in the aſſignment; the aſſignment was admitted on the pleadings. The real queſtion is, whether the Defendants could aſſign to whom they pleaſed, ſo as to deſtroy their own liability. If you have no remedy againſt the aſſignee, you muſt loſe your rent, and get poſſeſſion of the premiſes as ſoon as you can. The only caſe in which a queſtion of fraud could ariſe, is, where the aſſignor has kept poſſeſſion of the premiſes, of which he makes a profit, and has made an aſſignment to prevent reſponſibility. But even there, if the poſſeſſion be profitable, there will always be ſomething on the premiſes for the landlord to diſtrain; ſo that I doubt whether there can ever be ſuch a thing as a fraudulent aſſignment, and whether an iſſue on ſuch a point can ever be well taken. It is clear that there is no fraud in aſſigning to a beggar (*a*), or to a perſon leaving the kingdom, provided the aſſignment be executed before his departure. The Defendants had a right to deveſt themſelves of the intereſt, by the mere form of an aſſignment, which drives the Plaintiff to take poſſeſſion.

Buller J. An aſſignee is only liable while he continues to be legal aſſignee; that is, while he is in poſſeſſion under the aſſignment (*b*). I will firſt conſider the caſe as it ſtood at the trial, and next as it ſtands upon the facts of the affidavit. What was to be tried? not whether an aſſignment had been made or not; that was taken *ex conceſſis*; it was admitted on the record. Where the aſſignor continues in poſſeſſion, is the only caſe where the replication *per fraudem* can be good; here the Defendants were clearly not in poſſeſſion, and had no uſe of the premiſes; then what becomes of the iſſue? Secondly, has any thing appeared ſince the trial to ſhew that juſtice has not been done? the very reverſe. Was the Plaintiff taken by ſurprize? It is true, that he has found a perſon of the name of *Biſhop*, reſpecting whom there is ſome doubt, if he be the perſon mentioned at the trial; but the Defendants have received no benefit; they offered to give up the premiſes, which offer was refuſed. The Plaintiff adhered to the ſtrict point of law againſt the juſtice of the caſe; the law is againſt him, and therefore he ſhall have no indulgence.

Heath J. This action is founded on the privity of eſtate (*c*); but here there is none, therefore the Plaintiff is not entitled to recover. So far from fraud appearing, the Defendants declared their deſire

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(*a*) *Pitcher* v. *Tovey*, *Salk.* 81. 4 *Mod.* 71. S. C.

(*b*) Vide *Walker* v. *Reeves*, *Doug.* 461, in the note, and *Buller's N. P.* 159.

(*c*) *Carth.* 177.

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deſire of ſurrendering before they aſſigned, but the Plaintiff refuſed to accept.

Rooke J. Of the ſame opinion.

Rule abſolute.

May 16th.

Benton *v.* Sutton.

If a ſheriff's officer having taken a priſoner in execution, permit him to go about with a follower of his before he takes him to priſon, it is an eſcape. *Qu.* Whether it would not have been an eſcape alſo, if the officer himſelf had accompanied him?

Debt againſt the Defendant as ſheriff of *Surry*, for an eſcape of a priſoner in execution. This caſe came on to be tried before *Runnington* Serjeant, ſitting for *Hotham* Baron, at *Kingſton* Spring Aſſizes 1797.

In a ſuit, in which *Benton* was the Plaintiff, and one *Evans* the Defendant, a writ of *capias ad ſatisfaciendum*, returnable on the 3d of *November*, was ſued out on the 1ſt of *June* againſt *Evans*, and delivered at the ſheriff's office, and a warrant made out thereon to *Donolly* and *Benton* (the Plaintiff's father). Soon after a ſimilar writ iſſued againſt *Evans* at the ſuit of one *Tibbits*, returnable on the 7th of *November*, and a warrant was made out thereon to one *Purkiſs* the ſheriff's officer: by virtue of which laſt writ *Evans* was arreſted on the 27th of *September*, and carried to a lock-up-houſe belonging to the officer. On the 2d of *October* he was permitted by *Purkiſs* to go in company with *one of his followers* of the name of *Iſaacs*, to his own houſe, for the purpoſe of ſettling his affairs, and on the 3d was ſeen riding in *St. George's Fields*, in a chaiſe-cart, attended by the ſame perſon. On theſe facts *Runnington* Serjeant being of opinion that no eſcape had been made out, directed a nonſuit.

Shepherd Serjt. on this day ſhewed cauſe againſt a rule obtained by *Le Blanc* Serjt., for ſetting aſide the nonſuit and granting a new trial.

Shepherd. *Evans* was not arreſted under the writ at the ſuit of the Plaintiff, but under that at the ſuit of *Tibbits:* a warrant was made out on the Plaintiff's writ, and put into the hands of *Benton* his father, with an injunction not to inforce it at that time: this laſt fact came out upon the croſs-examination. Though therefore the Plaintiff's *capias ad ſatisfaciendum* was lodged in the ſheriff's office in the month of *June*, and *Evans* might conſequently be conſidered in execution at the ſuit of both, and ſo the preſent Plaintiff might maintain an action for an eſcape, yet the fact to which

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which I have alluded would be a ſufficient anſwer, and though not mentioned in Mr. Serjt. *Runnington's* notes, might perhaps ſave expence, if allowed to be proved now.

Eyre Ch. J. I ſee no great force in that fact. When the Plaintiff firſt took out the warrant, he might not intend it to be executed; but on *Evans* being arreſted at the ſuit of another, he might then intend it to be enforced. *Evans* being once in execution under other proceſs, it would be very difficult to diſcharge him from any writ in the office.

Shepherd. The law acknowledges but two kinds of cuſtody. Cuſtody of the gaol, and cuſtody of the officer. When *Evans* was arreſted he was taken to the houſe of the officer, not to the county gaol: and the ſuppoſed eſcape was his going with a ſervant of the officer to his own houſe, for about an hour. Now the caſes on this point are, where the party had once been in gaol: as *Balden* v. *Temple*, *Hob.* 202. *Platt* v. *Lock*, *Plowd.* 35. So the caſe of Sir *Miles Hobart* and *William Stroud*, *Cro. Car.* 209, was decided on the ground of their having once been within the limits of the *Gate-houſe Priſon.* For if a party has once been in gaol, he can never *quit* it without an eſcape in the ſheriff. I admit that if *Evans* had *ever* been *at large* this would have been an eſcape: but the queſtion is, whether he can be conſidered as ever having been at large, when attended by a bailiff's ſervant. I contend that the bailiff had him always (if I may uſe the expreſſion) in his manual poſſeſſion. It has never been held that an officer is bound to take a party to *priſon* before the return of the writ; but he muſt keep him in ſafe cuſtody: while he is with the officer he is in ſafe cuſtody, whether he be in the houſe, the ſtreet, or elſewhere. This is not like the caſe of *Hawkins* v. *Plomer*, 2 *Black.* 1048. For there the priſoner was ſtated to be *at large*, and that means out of the *cuſtody* of the officer, not merely out of the officer's *houſe*. Here there was no eſcape from gaol, for the priſoner was never there; and no eſcape from the officer, for the priſoner was as much in his cuſtody at the time of the ſuppoſed eſcape, as when he was in his houſe.

Le Blanc contrà. It is admitted that if *Evans* had gone alone, it would have been an eſcape; therefore it is admitted that an eſcape may as well take place before the return of the writ as afterwards. Put the caſe thus: May a ſheriff's officer allow a priſoner to be at *any time* in *any place*, before the return of the writ, provided there be ſome perſon appointed by the officer with him? If the

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Court allow this, they muſt ſay, that if the ſheriff were to ſend the *priſoner*'s father, or brother, or any other perſon, with him, that would be *arcta cuſtodia.* The diſtinction is between execution, and meſne proceſs. On the latter, the ſheriff may let the priſoner go upon his honour or promiſe, and is not liable to be puniſhed, provided he have him at the return of the writ. But with reſpect to the former, it is different; there if the bailiff voluntarily permit the priſoner to go at large, though only for a minute, he cannot afterwards retake him. *Atkinſon* v. *Mattiſon*, 3 *T. R.* 176. The writ of *capias ad ſatisfaciendum* having a return day as well as meſne proceſs, the only diſtinction between them would be deſtroyed, if a continued cuſtody of the priſoner were not inforced, for the purpoſe of making ſatisfaction to the Plaintiff by the dureſs of impriſonment. The confinement of the Defendant's perſon is the only means of compelling payment of the debt; it is not therefore a ſufficient cuſtody, if the priſoner be permitted to go about with the officer, *Hob.* 202. much leſs with a ſervant of the officer, *Plowd.* 35. If the dureſs of impriſonment be relaxed more than is neceſſary to carry the writ into execution in a convenient time and manner, I contend that it is an eſcape. In *Bl.* 1048. the priſoner was never committed to gaol; and the principal queſtion was, whether there could be an eſcape out of execution before the return of the writ; and it was held there might. The houſe of the officer is the gaol, ſo long as he keeps the priſoner there. For whatever place is neceſſary to ſecure the priſoner, is for that purpoſe a gaol. In proceſs of execution the ſheriff is liable in caſe of reſcue, even before the priſoner is carried to gaol. For it is ſaid in Sir *Thomas Jones*, 197, "that the cuſtody of the bailiff is the cuſtody of the ſheriff; "and if a priſoner be reſcued out of the cuſtody of the bailiff, the "ſheriff ſhould return it as a reſcue out of his own cuſtody." So that the only queſtion is, whether *Evans* was at large or not, when the ſervant of the officer, having the warrant in his poſſeſſion, was with him. But the bailiff cannot give authority under the warrant to his ſervant; for the warrant is directed to a particular perſon. Either caption or reception muſt be in the legal preſence of the bailiff. It has been determined in ſeveral caſes, and the rule of law is perfectly clear, that he may allow another to lay hold of a party in his preſence, but not out of it. For there is no ſuch thing as an abſolute delegation of his authority to a third perſon. Here then *Evans* was not in legal cuſtody; and if he had attempted an eſcape, the follower could not legally have reſiſted him. One who has no authority to arreſt a perſon in the firſt inſtance, can have no authority to detain him in cuſtody.

Eyre Ch. J. The caſes go no further than to ſay, that it is an eſcape in the ſheriff where the priſoner *is at large:* what ſhall be deemed being at large, and therefore an eſcape, may be difficult to aſcertain; and whether in this particular caſe the indulgence ſhewn to the priſoner will be an eſcape, may admit of conſiderable doubt. But one part of the argument ſtruck me as very difficult to be anſwered, namely, that *Evans* was in no cuſtody at all, under the circumſtances of this caſe. The cuſtody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the priſoner if he had choſen to eſcape, and the warrant would have been no juſtification to him, if any miſchief had happened; which reduces the caſe to this point, that the priſoner was found abſolutely at large. On this narrow ground, I am prepared to ſay that the nonſuit was wrong. On the general one, I think it would require ſome conſideration. Undoubtedly the effect of proceſs of execution is to operate immediately by the dureſs of impriſonment; and caſes may be put, where, if the officer attempted to juſtify any length of indulgence, under colour of the priſoner being always in his preſence, the Court would ſay that it was an eſcape. Suppoſe the officer wore the livery of the priſoner, and rode with him to a horſe-race, this would be contrary to the exigency of the writ. Whether any diſtinction can be ſafely drawn between this laſt ſtrong caſe, and the laudable and compaſſionate one, of accompanying the priſoner to his houſe, for the purpoſe of enabling him to examine his books, and ſettle the means of diſcharging his debt, I ſhould have conſiderable doubt. On the narrow ground, however, it is clear that the priſoner was not in legal cuſtody.

Buller J. I am perfectly ſatisfied that the nonſuit was wrong. What my Lord has dropped is extremely correct, and I agree in the inſtance which he has put, that if the priſoner had gone to a horſe-race attended by a bailiff, it would have been an eſcape: and I think that no diſtinction can be made between ſuch a caſe as this, and one which originates in more laudable motives. Wherever the priſoner in execution is in a different cuſtody from that which is likely to inforce payment of the debt, it is an eſcape. It has been aſked whether an action on the caſe would lie for not arreſting on the earlieſt opportunity. I have no doubt but that it would; but the damages muſt depend on the particular circumſtances. Let us put a caſe. The laſt day of laſt *Trinity* Term was the 15th of *June*. Suppoſe a *capias ad ſatisfaciendum* to have iſſued on that day, and proof that the officer to whom the warrant was directed was in company with the perſon named in the writ on the 16th, and that he omitted to arreſt him: on the 4th of *November* he does arreſt him, and on the 6th brings the body into court: if on the 16th of *June*, when the officer was in company with the priſoner, he was in good circumſtances, and between that day and the 4th of *November* he has become a bankrupt, the Plaintiff may ſay to the officer, I have loſt my debt by your not putting the party in reſtraint ſooner, I have ſuſtained damages, and am intitled to recover them by an action. When a priſoner is removed by habeas corpus, if the officer carry him out of the direct road, it is an eſcape. The caſe in *Blackſtone's Reports* pretty well eſtabliſhes the propoſition, that there may equally be an eſcape, whether the party has been committed to gaol or not. In this caſe what was done by the follower or officer (if an officer he can be called) was not done in execution of the writ. He took the priſoner from the bailiff's houſe to his own, and for what purpoſe ſignifies nothing; he might as well have carried him to a horſe-race.

Heath J. What is ſaid in *Hobart* 202 (*a*) is very material. The rule ſeems to be that a party muſt be taken to priſon in a convenient time. What is convenient is a queſtion for the determination of the judge, who will admit of all reaſonable delay: but if that be made uſe of by the officer, as a means of giving more liberty than he ought, he will be liable for an eſcape.

Rooke J. I think the nonſuit wrong, on the ground which my Lord has ſtated, that the priſoner was not in legal cuſtody. I ſhall give no opinion on the general ground: I have no doubt, however, that where a party has been really injured by the ſheriff's neglecting to arreſt on the earlieſt opportunity, an action will lie for the injury ſuſtained.

Rule abſolute.

(*a*) In *Balden* v. *Temple* Lord *Hobart* ſays, "Let keepers of priſons beware when they receive an habeas corpus from *Chancery*, or any other court, bearing teſte in the end of a term, to have the body of one in execution in the court the next term, that they do not, by colour of ſuch writs, ſuffer the party to go at large all the mean time (as it is ſometimes practiſed); for the writ warrants no more, but that he be brought out of priſon only for that purpoſe, and only for ſo much time as in judgment of law ſhall be convenient and neceſſary for the execution of the writ, and no more: which in *privilegiis adverſis* muſt ever be ſtrict."

In the Exchequer Chamber.

SYKES *v.* HARRISON, in Error.

May 17th.

The Court of *Exchequer Chamber* will allow intereſt to a Defendant in error, under the 3 *H.* 7. *c.* 10. on a judgment of non-pros as well as on a judgment of affirmance. Note; For the future, the intereſt allowed will be 5*l. per cent.* inſtead of 4*l.*

ERROR on a judgment in the King's Bench in an action of covenant, for liquidated damages. The Plaintiff in error was nonproſſed.

On a former day *Dampier* moved "that it ſhould be referred "to the clerk of the errors, to calculate the amount of the intereſt "upon the final judgment recovered in this cauſe, in his majeſty's "Court of *King's Bench*, from the time of the allowance of the "writ of error, until the ſigning of the non-pros in this Court, and "that ſuch intereſt might be added to the damages, for which ſuch "final judgment was entered up." But the Court ſeeming to think there might be ſome difference between this and the caſe of an affirmance of judgment, only granted a rule to ſhew cauſe.

Giles now ſhewed cauſe, and ſaid that he would not contend for a diſtinction between a judgment of non-pros, and a judgment of affirmance, as he found no caſes to warrant it, and the 3 *H.* 7. *c.* 10. did not appear to allow ſuch a diſtinction. But on the authority of *Shepherd* v. *Mackreth*, 2 *H. Bl.* 284. ſubmitted that as it was a matter intirely in the diſcretion of the Court, to allow intereſt in the ſhape of damages or not, they would not give it, where the delay was not imputable to the Plaintiff in error, for in ſuch caſe the Defendant was entitled to no indulgence. He ſtated that final judgment in the *King's Bench* was ſigned on the 6th of *July* 1795, ſoon after which the writ of error was brought; that in the *Michaelmas* term following, the Plaintiff in error filed a bill in the *Exchequer*, and obtained an injunction; that the anſwer was not put in till the 11th of *February* 1796, to which exceptions were taken and allowed; that an order was then made to amend the bill, which was accordingly done, and that a further anſwer was not put in till the 27th *June* 1796, and the injunction was not finally diſſolved till the 15th *December* following. He contended, that notwithſtanding the injunction, the Defendant might have proceeded to non-pros the writ of error, by a motion of courſe in the *Exchequer*; 1 *Fowler's Practice in the Exchequer* 330. and that conſequently the delay was on his ſide. He could not complain of the Plaintiff's depriving him of the fruit of his judgment, when in fact he was only tied up by an injunction.

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SYKES *v.* HARRISON.

At all events the delay was imputable to him ſince the 10th of *December*, as the injunction remained in force till that time only.

EYRE, Ch. J. We certainly have no juriſdiction to inquire into the proceedings in equity. But the Plaintiff having proceeded there without juſt ground, as the event has ſhewn, is a ſtrong reaſon to induce us to go as far as we can againſt him.

Dampier then ſuggeſted, that as money was now ſo much riſen in value, if the Court ſhould not allow the Defendant in error 5 *l. per cent.* although 4 *l.* had been the uſual ſum, it would be enabling the Plaintiff in error to fight the Defendant with his own money.

Giles contrà, relied on the caſes of *Shepherd* v. *Mackreth*, and *Lord Lonſdale* v. *Littledale*, 2 *H. Bl.* 287. where the Court allowed 4 *l. per cent.* only.

Per Curiam. The better way will be to allow 4 *l. per cent.* only, in the preſent inſtance, and to give notice that 5 *l. per cent.* will be allowed in future.

Rule abſolute.

In the Exchequer Chamber.

May 17th.

DENN ex dem. MELLOR *v.* MOORE in Error.

Where judgment for the Defendant on a ſpecial verdict, is reverſed in the *Exchequer Chamber*, that Court on motion will give a final judgment for the Plaintiff.

JUDGMENT on a ſpecial verdict in ejectment having been given for the Defendant in the *King's Bench*, and reverſed in this Court,

Chambre now moved that it might be added to the judgment, that the Plaintiff do recover his term, damages and coſts. He cited *Philips* v. *Bury*, *Lord Raym.* 10. *Carth.* 319. and *Skinn.* 514. where *Holt* Ch. J. ſaid "There would be a difference where judgment was given upon demurrer, and where upon a ſpecial verdict: where it is upon a demurrer, the Courts above ought to give a judgment for the Plaintiff (if they reverſe that for the Defendant), and then it is ſent down, and a writ of inquiry goes, and upon that the Court below gives a final judgment; but where it is upon a verdict, there, if they reverſe a judgment they ought to give the ſame judgment that ought to have been given at firſt, and that judgment ought to be ſent to the Court below."

The Court ſeemed at firſt to doubt whether they ſhould grant this in the firſt inſtance, or only give a rule to ſhew cauſe, but on conſideration, thinking the point decided, ſaid: that the Plaintiff muſt enter up his judgment at his own peril, for if he entered it wrong, he ſubjected himſelf to another writ of error, and reverſal in another court.

Accordingly leave was given, in the firſt inſtance, to enter up judgment of reverſal, and that the Plaintiff ſhould recover his term, damages and coſts.

ANDERSON v. NOAH.

May 18th.

Miſnomer in the bail piece amended.

THE Defendant in this action having been arreſted by the name of *Noah*, and put in bail by the name of *Noel:* It was objected by *Le Blanc* Serjt. at the time of juſtification, that there was no bail in the action before the Court: but the Court gave leave to amend the bail-piece.

LANG Demandant, LEE, Gent. Tenant, and WOODHOUSE and Others Vouchees.

May 18th.

It is no objection to the paſſing a common recovery, that the order of the names of the vouchees in the præcipe at bar, and the dedimus varies. Nor that the warrants of attorney of the ſeveral vouchees, are on ſeparate pieces of parchment.

ON this day *Runnington* Serjt. deſired the opinion of the Court, on two objections, ſuggeſted by one of the officers, to the paſſing a common recovery.

The firſt objection was, that at the foot of the præcipe at bar, it was ſtated that, "the tenant in perſon voucheth to warrant "*John Chappel Woodhouſe*, clerk, *Ann Monpeſſon*, ſpinſter, and "*Mary Woodhouſe*, widow," whereas the dedimus was, "the tenant in perſon voucheth to warrant *Mary Woodhouſe*, widow, "*John Chappel Woodhouſe*, clerk, and *Ann Monpeſſon*, ſpinſter;" tranſpoſing the names.

The ſecond and more material objection, originated in the warrants of attorney, taken by virtue of the commiſſion. For there being three vouchees, two of them had given one joint warrant of attorney, and the other had given his on a ſeparate piece of parchment, when in ſtrictneſs the warrant ought to have been joint, that is, all on one piece of parchment.

He ſaid, that it was the wiſh of the officer, that this matter ſhould be mentioned to the Court; though both the warrants of attorney being annexed to the dedimus, could not be conſtrued

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Lang *v.* Woodhouse.

to relate to any other premiſes than thoſe contained therein. He added that all the parties were deſirous that the recovery ſhould paſs.

The Court (*abſente Eyre* Ch. J.) thought that there was nothing material in either of the objections.

And *Heath* J. ſaid, that the warrants would be good even in a real ſuit.

May 18th.

Holward *v.* Andre.

Where bail are oppoſed, and rejected, and the Defendant is ſurrendered on the next day, he may juſtify new bail without paying the coſts of the former oppoſition.

Bail in this action were oppoſed and rejected on a former day, and the Defendant ſurrendered on the next; freſh bail being now brought up for juſtification,

Cockell Serjt. inſiſted, that the Defendant not having been a priſoner at the time of the former oppoſition, the Plaintiff was entitled to the coſts of that oppoſition, before the new bail could be ſuffered to juſtify.

Sed per Curiam. The Court will not inſiſt on the coſts of a former oppoſition being paid to the Plaintiff, where the Defendant is ſurrendered on the next day. It has lately been determined otherwiſe.

May 19th.

Gardner *v.* Baillie.

A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of coſts there.

Le Blanc Serjt. moved that the prothonotary might review his taxation in this caſe, and allow the coſts of a bill of exceptions.

Per Curiam. The bill of exceptions is no part of the record, till after judgment; if it were, the Court ought to take it into conſideration before judgment; which is never done (*a*). The cauſe proceeds, and judgment is given here, as if there were no bill of exceptions; this may be accounted for, by the practice which formerly prevailed, of trying all cauſes in bank. The bill of

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(*a*) In 27 *H.* 8. *c.* 24, 25. in the *King's Bench*, *Fitzjames* Ch. J. ſaid "*Ex rigore* "*juris* a party ſhall not take advantage of "a bill of exceptions in arreſt of judg"ment, but ſhall be put to his writ of error, "and this is good to be obſerved in *C. B.*, "for the party may have a writ of error "here; but from this court he has only his "writ of error to Parliament, which would "be a great delay, and coſt to him; where"fore it is prudent that we ſhould exa"mine the matter before judgment." See alſo *Enfield* v. *Hills*, 2 *Lev.* 236. and *Buller's N. P.* 316.

of exceptions is carried into a Court of Error, and there annexed to the record; if it had been part of the record here, there would be no occaſion to ſend for the judge to acknowledge his ſeal; when that is acknowledged, it is then, for the firſt time, annexed to the record. Being for the benefit of the party who tenders it, and remaining in his poſſeſſion, it is in his breaſt to employ it or not. Regularly it ought to be tendered at the time of the trial, and ſealed by the Judge in Court; and though the practice is to allow the counſel to tender it afterwards, and ſome expence may ariſe to the parties before it is ſettled, yet this is not in a regular courſe of proceedings, upon which coſts can be incurred. If the record be lengthened by the bill of exceptions, coſts will be allowed for copying, fees to counſel, *&c.* by the Court of Error. But there can be no coſts in the Court below.

Le Blanc Serjt. took nothing by his motion.

SAUNDERS *v.* PITTMAN.

May 20th.

The Court will not put off a trial at the inſtance of the Defendant, on account of the abſence of a material witneſs, if he has conducted himſelf unfairly, or been the cauſe of any improper delay.

A RULE having been obtained by *Runnington* Serjt. to ſhew cauſe why the trial in this caſe ſhould not be put off till next *Hilary* term, on an affidavit, ſtating that a maſter of a veſſel employed in the Southern Whale Fiſhery, was a material witneſs in the cauſe, and that he was expected to return about *Chriſtmas* next,

Shepherd Serjt. ſhewed for cauſe an affidavit, ſtating that this action was brought on articles of agreement in the poſſeſſion of the Defendant; that the Defendant had delayed the cauſe, and prevented the Plaintiff from going to trial, while the Defendant's witneſs was in *England*, by withholding from the Plaintiff a copy of the articles, till he had moved the Court; when the Plaintiff found himſelf obliged to amend. He added that after the amendment, the rule to plead happened by miſtake to be in the original cauſe, inſtead of the amended one, and that the Defendant refuſed to waive that advantage, which produced a further delay.

Runnington contrà.

Per Curiam. The Court will not in all caſes be content with a common affidavit to put off a trial. It muſt be ſatisfied that injuſtice would be done, if ſuch an application were refuſed. Here a poor Plaintiff claims a debt; he wants to amend his proceedings by the articles of agreement, and the Defendant delays ſhewing them till he is obliged ſo to do; and in the mean time his witneſs leaves *England.* He has therefore brought himſelf into this diſficulty, by endeavouring to take an unfair advantage, and the Court will not conſider itſelf obliged to put off the trial of a cauſe for the accommodation of the Defendant, if the Defendant has not conducted himſelf fairly and candidly, and if he might have had his witneſs.

Rule diſcharged.

May 20th.

BRADLEY *v.* TUNSTOW.

The general term *coſts* in a rule of reference, does not include the coſts of that reference.

BY an order of the Chief Juſtice, made with the conſent of the parties, for referring this cauſe to arbitration, it was ordered, "That the debt for which this action is brought, be referred to "*F. C.* Eſq. to ſettle and determine how much, or if any and "what ſum is due to the Plaintiff from the Defendant, and that "for what ſum he ſhall find due, the Plaintiff ſhall be at liberty "to enter up his judgment, and ſue out execution for ſuch ſum "ſo found due, together *with his coſts*, provided the ſaid debt ſo "to be ſettled and aſcertained amount to 40*s.*"

The arbitrator awarded 40*l.* 14*s.* for the debt, and *coſts* to be taxed by the prothonotary. His taxation amounted to a certain ſum including the coſts of the reference; on which *allocatur* judgment being entered up by the Plaintiff, the Defendant applied to the prothonotary to ſtrike out the coſts of the reference; who, on reconſidering the matter, diſallowed them accordingly.

Le Blanc Serjt. on a former day having obtained a rule *niſi* to ſet aſide the judgment for this irregularity,

Shepherd Serjt. for the Plaintiff, contended, that where a cauſe was referred to arbitration, and the Court directed the coſts of the cauſe, to abide the event of the arbitration, and nothing was ſaid in the rule about the coſts of the reference, the coſts of the reference became part of the coſts of the cauſe, and ſo he underſtood the practice to be in the *King's Bench.*

Le Blanc contrà, ſaid, That under the rule the coſts *at law* (*a*) only, followed the event of the award; and if the coſts of the reference were intended to be included, the arbitrator ought to have awarded them, which he had not done; that as the reference was matter of mutual accommodation, the coſts ought to be paid by both parties equally, unleſs otherwiſe directed by the rule.

(*a*) *Cowp.* 127. 2 *Black.* 953. *Tidd's Practice in K. B* 545, 546.

EYRE Ch. J. It is impoſſible to ſay that the judgment in this caſe is irregular, for it follows the *allocatur* of the prothonotary. The queſtion therefore is not properly brought forward, but as it is before us, we may as well decide it. The whole difficulty ariſes from the ſuppoſed practice of the *King's Bench*. If that Court has ſanctioned the practice of including the coſts of reference under a condition in the rule, relating to coſts generally, I do not feel myſelf at liberty to ſpeculate upon the point. It appears however to me, that a reference being made for the convenience of both parties, the expences ought to be ſuſtained by both. A proviſion for the coſts of reference being generally made in the rules, but omitted in the preſent inſtance, is a ſtrong argument to ſhew that they were not here intended to abide the event of the arbitration.

BULLER J. The general practice in drawing up theſe rules, is to diſtinguiſh between the coſts of the reference, and the coſts of the cauſe; the latter uſually abide the event of the arbitration, the former not. Here that diſtinction is omitted, it is referred to the arbitrator, to determine the ſum due between the parties, and the coſts are to follow the event of his award. I am inclined to think the practice of the *King's Bench*, as ſuggeſted, to be right. Does not the term *coſts* mean all coſts? I do not ſee how to diſtinguiſh between the coſts of the cauſe, and thoſe which ariſe in the progreſs of the cauſe. All coſts which ariſe between the writ and the judgment, unleſs otherwiſe provided for as the cauſe goes on, muſt be conſidered as the coſts of the cauſe. But as we have ſeen theſe coſts of reference amount ſometimes to very hard ſums, it might not perhaps be foreign to ſuppoſe, that they were purpoſely omitted in this rule to avoid the poſſibility of ſuch expence. If there are any authorities on the ſubject, I think we muſt be bound by them.

HEATH J. I wiſh an uniformity of practice to prevail in the two Courts.

ROOKE J. If there be any caſe in the *King's Bench* to that effect, I think the coſts of the reference ſhould abide the event of the arbitration; otherwiſe I ſhould be of opinion with my Lord, that they ought not to be included.

The prothonotary having been deſired to inquire concerning the practice of the *King's Bench*, on this day reported that he had been informed by the Maſter, that though no caſe had occurred within his knowledge, where this queſtion had ariſen under the order of a Judge;

a Judge; yet that it was generally underſtood that an arbitrator had no power to give the coſts of the award, unleſs under a proviſion inſerted in the order of *niſi prius*.

Per Curiam. As we find the practice of the *King's Bench* does not warrant the idea of including the coſts of the reference under the general term *coſts*, the Plaintiff muſt now move to reform his judgment by conſent, and reduce it to the proper amount. But as the judgment was, ſtrictly ſpeaking, regular, and the Plaintiff was under the neceſſity of oppoſing this motion, we ſhall not allow the coſts of this application.

HOLLIS *v.* BRANDON.

May 23d.

If an affidavit to hold to bail be entitled "Plaintiff and "Defendant," it is bad.

CLAYTON Serjt. moved for a rule to ſhew cauſe, why the Defendant ſhould not be diſcharged out of the cuſtody of the Warden of the *Fleet*, on entering a common appearance, on the ground of an irregularity in the affidavit, by which he was held to bail.

The affidavit was intitled "*Edward Hollis* Plaintiff, and "*William Brandon* Defendant," and proceeded to ſtate "that "*William Brandon*, the Defendant in this cauſe, is juſtly indebted "to this deponent in the ſum of £.— for work done and performed by this deponent and his ſervants in and about the "buſineſs of the ſaid Defendant, and for the ſaid Defendant; and "for divers materials found and provided in and about the ſaid "work; and for money lent and advanced to the ſaid Defendant "at his ſpecial inſtance and requeſt."

The Defendant had been arreſted on a bill of *Middleſex* and bailed, and afterwards ſurrendered himſelf to the *King's Bench Priſon*, from whence he was removed to the *Fleet* by *habeas corpus* before declaration delivered.

On theſe facts, the Court granted a rule to ſhew cauſe, but ſuggeſted to the Plaintiff that he might file a ſupplemental affidavit.

On the 16th, *Shepherd* Serjt. ſhewed cauſe againſt the rule, and contended that there was no neceſſity for a ſupplemental affidavit, as the original one was ſufficiently poſitive.

Clayton Serjt. in ſupport of the rule. The affidavit was here intitled *Edward Hollis* Plaintiff and *William Brandon* Defendant, at a time when no cauſe in fact exiſted. An order was actually made in this very caſe, by one of the juſtices of the *King's Bench*, for the diſcharge of the Defendant, but he having been removed to the *Fleet*, the warden could not obey that order, and therefore the queſtion is brought before this court. In *King* v. *Cole*, 6 *T. R.* 640. the affidavit being intitled, "*R. King qui tam* v. "*T. Coles*," the Defendant was diſcharged on common bail. Alſo in a caſe of Sir *John Call* Bart. v. ——— before *Aſhhurſt* J. the Defendant was diſcharged on the ſame ground, and no obligation made. This caſe is ſtill ſtronger, as the affidavit was not only intitled with the names of the parties, but had the addition of Plaintiff and Defendant. It is a general rule, that a Defendant ſhall not be deprived of his liberty, unleſs the Plaintiff can be indicted for perjury if his affidavit be falſe. It muſt therefore be poſitive. There being a doubt in the preſent inſtance, whether an indictment for perjury could be maintained or not, the Court has given the Plaintiff an opportunity to file a ſupplemental affidavit, which he has not done. On the above grounds therefore I ſubmit that the rule muſt be made abſolute.

Shepherd Serjt. *contrà*. This caſe may be diſtinguiſhed from that of *King* v. *Cole*. There, the name of *T. Cole* was not added to the word Defendant in the body of the affidavit, whereas here the Plaintiff ſpeaks of *William Brandon* the Defendant. Beſides, the word "Defendant" may be rejected as ſurpluſage, for it is poſitively ſworn that *William Brandon* was indebted.

Eyre Ch. J. The idea of a ſupplemental affidavit proceeded on a collateral ground: it was ſuggeſted with a view to aſcertain who was meant by the perſon called Defendant. The Court underſtood that the affidavit was intitled, but that no name was added to the word "Defendant" in the body of it. If there be no other deſcription of the perſon indebted, the word "Defendant" is looſe and uncertain, and ought to be ſupplied; but when the affidavit ſays, "*William Brandon* Defendant," I ſhould much doubt whether it would be bad, merely becauſe it was intitled "*Edward Hollis* Plain-"tiff and *William Brandon* Defendant," before the commencement of the cauſe. Since the ſtatute for ſuing out bailable writs, it may be a queſtion whether an affidavit to hold to bail be not in fact a commencement of the cauſe. Why is a writ conſidered as the commencement of the cauſe before the parties are in court? and yet it always is ſo. This way of conſidering it will not break in upon what has been ſaid, that in an indictment for perjury, if the indictment ſtate the perjury to have been committed "in an affi-"davit in a cauſe," and there be no cauſe, the party cannot be convicted:

1797. HOLLIS *v.* BRANDON.

convicted: but here I doubt whether the affidavit be not a commencement of the ſuit.

BULLER J. It has been ſaid that if the Plaintiff was indicted for perjury there might be a doubt whether he could be convicted on a ſupplemental affidavit. Have not the Court juriſdiction? An application is made to them to diſcharge the Defendant in the regular exerciſe of their juriſdiction: they require a ſecond affidavit to aſcertain the debt: there can be no difficulty then in the aſſignment of perjury.

The Court having taken time to inquire, *Eyre* Ch. J. this day ſaid: We have conſidered this queſtion, and have found, upon inquiry, that it is the ſettled practice of the *King's Bench*, that in a motion for an information, if an affidavit be intitled in a cauſe, it is rejected. We think the rule ſhould be univerſal, for the only ground on which it is founded is, that it would be difficult if not impoſſible to indict for perjury upon ſuch an affidavit. We think alſo that the practice of both Courts ſhould be uniform.

Rule abſolute without coſts (*a*).

(*a*) Subſequent to this, in the caſe of *Clarke v. Cawthorne, Tr. T.* 1797, the Court of *K. B.* conſidered the practice of intitling affidavits to hold to bail too common to be deemed erroneous: and accordingly in two other caſes then before them, diſcharged ſimilar rules to the preſent: but at the ſame time determined to make a rule of Court ordering that ſuch affidavits ſhould not be intitled for the future. *Vide* 7 *T. R.* 321.

May 26th.

JOLLIFFE *v.* MORRIS.

The Court of *C. B.* will make the payment of coſts for not proceeding to trial, a term of diſcharging a rule for judgment as *in caſe of a nonſuit*.

SHEPHERD Serjt. on a former day obtained a rule to ſhew cauſe, why judgment as in caſe of a nonſuit ſhould not be entered up in this caſe, for not proceeding to trial according to the Plaintiff's undertaking.

The Court now inclining againſt him, on an affidavit of merits ſhewn by *Runnington* Serjt., and a peremptory undertaking to try at the next aſſizes offered;

Shepherd deſired that payment of coſts for not proceeding to trial might be made a term of diſcharging the rule.

The Court ſeemed at firſt to doubt whether, if a party elected to move for judgment, as in caſe of a nonſuit, he did not thereby waive the coſts of not proceeding to trial; and if intitled to them, whether it was not neceſſary to apply by a ſeparate motion; but having read a note (*a*) from the book of one of the officers, by which it appeared that the practice of this Court differed from that of the *King's Bench* in this reſpect, they ſaid that coſts for not proceeding to trial might be given on the motion for judgment as in caſe of a nonſuit, and accordingly with that condition

Diſcharged the rule.

(*a*) The name of the caſe mentioned in the above note, where the Court of *K. B.* refuſed to give ſuch coſts, unleſs on a ſeparate motion, was *Triands* v. *Goldſmith* and Another.

RICE *v.* BROWN.

May 27th.

A pauper, as ſuch, can never pay coſts. *Semb.* That he may receive them for the defaults of his opponents.

THE Plaintiff in this caſe ſued as a pauper: and the cauſe ſtanding in the paper for trial, on the firſt ſitting in *Eaſter* Term, was on that day made a remanet, until the ſecond ſitting in the ſame term, by an order of niſi prius at the inſtance of the Defendant, he undertaking to pay the coſts of the day, and alſo of that application. The order was made a rule of this Court, and the coſts allowed by the prothonotary; but the Defendant refuſed to pay them: in conſequence of which, *Runnington* Serjt. on a former day moved for an attachment.

When this was firſt mentioned, the Court ſeemed to entertain ſtrong doubts whether a pauper could be allowed coſts; and *Runnington* was deſired to look into the matter.

On this day he contended, that it was regular for a pauper to recover coſts, and that it was the practice to allow them, where, had he not been a pauper, he would by the verdict have been entitled to them. He cited 3 *Bl. Com.* 401, where it is ſaid, "a "pauper may recover coſts, though he pays none;" and *Scatchmer* v. *Foulkard*, 1 *Eq. Ca. Ab.* 125. where Lord *Somers*, after much inquiry, ordered coſts to a pauper; "for though he were at no "coſts, or at ſmall coſts, yet the counſel and clerks did not give "their labour to the Defendant, but to the pauper." He ſaid in *Walker* v. *Packer*, *Cooke*'s *Caſes of Practice in C. P.* 47. the Court ordered coſts to be taxed againſt a pauper for not proceeding to trial, and declared that a pauper ſhould pay coſts for all defaults, as an executor or adminiſtrator ſhould for their own defaults (*b*). If then a pauper was liable to pay coſts for his own defaults, why

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(*b*) See alſo 1 *Str.* 420.

ſhould he not receive them for thoſe of his opponent. He urged that in this caſe, it was hardly within the diſcretion of the Court to refuſe them, ſince the application was founded on conſent, and a voluntary undertaking to pay the coſts which had been made a rule of Court.

Cockell Serjt. *contrà*, ſaid, (and it was allowed on the other ſide,) that the pauper had not the ſmalleſt merits on the trial.

Per Curiam. The caſe that has been cited reſpecting the payment of coſts by a pauper, is not law. The mode of proceeding by the Court is this: where a pauper miſbehaves himſelf, he is diſpaupered in conſequence (*a*), and ſo becomes liable to coſts. In this caſe, however, the attachment muſt iſſue.

May 27th.

Mayor and Burgeſſes of Stafford *v.* Bolton.

Plaintiffs were incorporated by the name of "the Mayor and Burgeſſes of the borough of *Stafford in the county of Stafford*," and ſued by the name of "the *Mayor* and *Burgeſſes* of the borough of *Stafford*." This is in abatement, and not in bar.

This was an action on the caſe for tolls.

The declaration began, "That whereas the town of *Stafford* in the county of *Stafford* is, and from time immemorial "hath been, an antient borough; and the burgeſſes of the ſaid "borough from time immemorial have been a body politic and "corporate in deed, fact, and name, and have been confirmed by "divers letters patent, of divers late kings and queens of *England*, "at divers times, by divers names of incorporation, and for divers, "to wit, fifty years laſt paſt, have been ſuch body politic and corporate, *by the name of the Mayor and Burgeſſes of the borough of* "*Stafford*." It then went on to ſtate that, "the ſaid mayor and "burgeſſes had been accuſtomed to repair the pavements of the "ſaid borough, for the more convenient bringing of corn and "grain into the ſaid borough, and by reaſon thereof had been accuſtomed to receive a reaſonable toll for all corn or grain brought "into the ſaid borough, to be ſold or delivered to any perſon "within the ſaid borough; that one *E. H.* brought into the ſaid "borough, within the ſame to be delivered, and within the ſame "actually delivered to the Defendant, divers, to wit, forty buſhels "of oats; that thereupon the ſaid mayor and burgeſſes demanded "of the Defendant half a buſhel of oats as and for the ſaid toll;

(*a*) 2 *Str.* 1122. 2 *Salk.* 506. 3 *Wilſ.* 24. and the caſes cited therein. In *Butler* v. *Inneys & Ux.* 2 *Str.* 891. a pauper having been nonſuited in a firſt action, and having recovered in a ſecond, the Court refuſed to deduct out of the recovery in the ſecond action the coſts of the firſt.

Mayor and Burgeſſes of STAFFORD *v.* BOLTON.

" that the ſaid Defendant refuſed to deliver the ſame to the ſaid " mayor and burgeſſes," &c.

Plea not guilty, and iſſue joined thereon.

This came on to be tried before *Thomſon* Baron at *Stafford* Spring Aſſizes 1797.

The Plaintiffs produced in evidence a charter of 12 *Jac.* 1. which after reciting, " That whereas our borough of *Stafford* in the county " of *Stafford* is an antient and populous borough, and the bur- " geſſes of that borough from time whereof, &c. have had, uſed, " and enjoyed divers liberties, &c. as well by our charters, as thoſe of " divers of our progenitors and predeceſſors, late kings and queens " of *England*, to them and their predeceſſors, ſometimes by the " name of burgeſſes of *Stafford*, and ſometimes by the name of " burgeſſes of the borough of *Stafford*, and ſometimes by the name " of burgeſſes of the town of *Stafford*, and ſometimes by the name " of the bailiffs and burgeſſes of the borough of *Stafford* in the " county of *Stafford*, and by other names heretofore made, granted, " or confirmed, as alſo by reaſon of divers preſcriptions, uſages, " and cuſtoms in the ſaid borough, uſed and accuſtomed," &c. and alſo reciting letters patent of 3 *Jac.* 1. by which the burgeſſes and inhabitants of the borough aforeſaid, " by whatever name or names " they had been theretofore incorporated, or whether they had been " lawfully incorporated or not, for the future for ever, without any " doubt or ambiguity thereof, were incorporated by the name of bai- " liffs and burgeſſes of the borough of *Stafford* in the county of *Staf-* " *ford*," &c. proceeded: " We will, ordain, conſtitute, and grant, " that the ſaid borough of *Stafford* in the aforeſaid county, in fu- " ture may, and ſhall be a free borough of itſelf, and that the bai- " liffs and burgeſſes of that borough, and alſo all and ſingular " the burgeſſes and inhabitants of the ſame borough, by whatſo- " ever name or names they or their predeceſſors have heretofore " been incorporated, and whether they have been heretofore in- " corporated or not, and their ſucceſſors in future, for ever may " and ſhall be by force of theſe preſents one body corporate and " politic, in deed, effect, and name, *by the name of the Mayor and* " *Burgeſſes of the borough of Stafford in the county of Stafford*; and " them *by the name of the Mayor and Burgeſſes of the borough of* " *Stafford in the county of Stafford*, one body corporate and politic, " in deed, effect, and name, really and to the full for us, our heirs " and ſucceſſors, we do erect, ordain, conſtitute, and declare by " theſe preſents, and that by the ſame name they ſhall have per-

"petual ſucceſſion, &c. and that by the ſame name of mayor and "burgeſſes of the borough of *Stafford* in the county of *Stafford*, "they may plead and be impleaded, anſwer and be anſwered "unto, defend and be defended, in any courts and places, and "before any judges and juſtices, &c. in all and ſingular actions "&c. in the ſame manner and form as any other our liege ſubjects "of this kingdom of *England*, perſons able and capable in law, "or any other body corporate and politic within our kingdom of "*England*, are able to plead and be impleaded, anſwer and be "anſwered unto, defend and be defended," &c.

On this evidence, the Defendant's counſel objected that there was a variance between the name of the corporation in the charter and that in the declaration; and after ſome argument, the learned Judge nonſuited the Plaintiffs.

On the 1ſt day of this term *Williams* Serjt. obtained a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial be had. He cited *Bro. Abr. Miſnomer* 73. *Brieſe* 398. and 10 *Co.* 122.

Le Blanc Serjt. now ſhewed cauſe. This is a corporation by preſcription and charter; the charter contains a recital of the various names by which the Plaintiffs have been known, but makes no mention of that by which they have declared: it gives them a particular name by which they may ſue and be ſued, and to which therefore they are bound to adhere. A corporation by charter can have no other name than that which it receives from the Crown, and whenever any ſubſequent charter is accepted by a particular name, all former names are done away. The queſtions are; Whether the mayor and burgeſſes of the borough of *Stafford* be the ſame as the mayor and burgeſſes of the borough of *Stafford* in the county of *Stafford?* and whether the variance could be taken advantage of on the trial, or ought to have been pleaded in abatement? Suppoſe an action for toll brought by *A. B. C.*, and it appeared that the right was in *A. C. D.* could they have recovered? Suppoſe the Plaintiffs had called themſelves the mayor and burgeſſes of the borough of *Stratford*, they would not have ſhewn themſelves to be the perſons entitled to the toll. If you admit a variance of locality, you may admit a variance of perſon: by firſt taking away one part, and then another, though each ſeparate variation be of ſmall importance, the name will be completely altered. There are caſes where variances in the names of corporations have been paſſed over; as in *King's Lynne*, 10 *Co.* 123. but all thoſe were caſes of leaſes or other ſecurities;

and it is laid down in the Books that " there is a ſound difference " betwixt writs and grants." 10 *Co.* 125. *b.* So in *Gilb. C. B.* 234. " there is a difference between writs, declarations, &c. and " obligations and leaſes; for if the name of a corporation be " miſtaken in a writ, a new writ may be purchaſed of common " right, but it were fatal if miſtaken in leaſes and obligations, and " the benefits of them would be wholly loſt; and therefore one " ought to be ſupported, and not the other. *John Abbot* of *W.* " granted common of paſture to *I. S.*, by the name of *William* " *Abbot* of *W.*; this is good enough *cauſâ quâ ſuprà*; but if this " name had been thus miſtaken in a writ, it had been fatal." As for the caſe of *King's Lynne,* it was an attempt by the Defendant to avoid his own deed; beſides the verdict had found that the obligor had made the bond to the Plaintiffs, by the name in the declaration. If that name be altered in the deſcription of a corporation which is given to it by charter, it ceaſes to be a corporation. It is laid down every where, that locality is of the eſſence of a corporation; if ſo, leaving that uncertain, or giving it a wrong deſcription, is completely changing the name. The Court can draw no line in variances of this kind. It is true, that in the 25 *Ed.* 3. 48. where a *præcipe quod reddat* againſt the prior of *Worceſter*, was *præcipe priori Wigorniæ*, and the prior pleaded that in *Worceſter* there were two priories, *viz.* the priory of Friars Preachers, and the priory of Our Lady, and that it ought to have been, *Priori Eccleſiæ S. Mariæ Wigorniæ de Wigorniâ;* the writ was abated. But there it was the Defendant who was miſnamed; he knows his proper title, and may abate the writ, and give a new one. But here, unleſs the Plaintiffs demand the toll in the name given them by the Crown, they ſhew no title (a); for although a Plaintiff may reply that a Defendant is known as well by the one name as the other, he cannot reply that of his own name.

Shepherd Serjt. on the ſame ſide.

Williams contrà was ſtopped by the Court.

EYRE Ch. J. If it cannot be denied that this variance might have been pleaded in abatement, it decides the queſtion. The arguments on the part of the Defendant go to ſhew that it ought to be in bar. A corporation is a mere creature of the Crown, having no eſſence but what is derived from its name. On ſtrict reaſoning therefore I ſhould be inclined to think, that if a corporation ſued by a name which did not belong to it, it would be as

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(a) *Patrick* and *Pepper's* caſe, at *O. B.* Seſſion, *February* 1783. before *Buller* J. *Leach* 244.

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Mayor and Burgeſſes of STAFFORD *v.* BOLTON.

nothing. In the caſe of a miſtake in the name or deſcription of an exiſting perſon having a right to ſue, it may be pleaded in abatement. But the caſe in *Brooke*, *Miſnomer* 73. ſeems to put a corporation in the ſame ſituation with a natural perſon as to pleas in abatement: where it is ſaid in an action by a corporation or a natural body, miſnomer of one or the other goes only to the writ; but to ſay that there is no ſuch perſon *in rerum naturâ*, or no ſuch body politic, this is in bar, for if he be miſnamed, he may have a new writ by the right name; but if there be no ſuch body politic or ſuch perſon, then he cannot have an action. 22 *Ed.* 4. *c.* 34. Here there was a corporation of nearly the ſame name, and I think therefore on authorities, that the nonſuit was wrong.

BULLER J. The argument of locality will not here decide the queſtion; the name in the declaration imports locality, as the Plaintiffs ſtate themſelves to be the mayor and burgeſſes of the borough of *Stafford*, only omitting the county of *Stafford*. This brings the caſe within the diſtinction laid down in *King's Lynne;* for there is a difference in omitting matter of ſubſtance, and mere matter of addition. If the variance can be pleaded in abatement, it cannot in bar. To make it pleadable in bar, it muſt appear that there is no ſuch corporation. The Year Books are deciſive.

HEATH J. I am of the ſame opinion. In 22 *Ed.* 4. *c.* 34. which was an aſſize by the Maſter, and brethren of the fraternity of the Nine Orders of Angels in *B.*, and the Defendant pleaded, that they were incorporated by the name of the *Maſter and Brethren of the Fraternity of All Saints, and the Nine Orders of Angels in B.*; the writ was abated, which ſhews that a miſnomer may be pleaded in abatement, where the *Plaintiff* miſnames himſelf.

ROOKE J. I think we ought not to be more ſtrict than they were in the days of the Year Books.

Rule abſolute.

May 26th.

FOWLER *v.* DOWN.

If an order for the delivery of goods in the hands of a third perſon be given to an uncertificated bankrupt in payment of a debt accrued ſubſequent to his bankruptcy, he may maintain trover for them.

THIS was an action of trover brought by an uncertificated bankrupt.

The Plaintiff had carried on buſineſs for ſome time, and in a conſiderable way ſince his bankruptcy, and had advanced ſeveral

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ſums of money to one *Davidſon*, in part payment of which *Davidſon* gave an order for delivering to the Plaintiff fifty barrels of beef belonging to him, and then in the hands of the Defendant. The Defendant on demand refuſed to deliver up the beef ſo aſſigned by *Davidſon* to the Plaintiff, on which this action was brought; and the cauſe being tried before *Eyre* Ch. J. at *Guildhall* at the Sittings in this term, a verdict was found for the Plaintiff with liberty to the Defendant to move to ſet it aſide and enter a nonſuit.

Shepherd Serjt. having previouſly obtained a rule *niſi* for the above purpoſe, was this day called upon by the Court to begin in ſupport of it.

Shepherd. The inference to be drawn from *Evans* v. *Mann*, *Cowp.* 569. and *Martyn* v. *O'Hara*, *Cowp.* 823. is, that property acquired by a bankrupt after the aſſignment becomes the property of his aſſignees: for in thoſe caſes there was no new aſſignment. In the firſt of them it was decided, that if a bankrupt ſell goods previous to his bankruptcy, the aſſignees muſt ſue the vendees *as aſſignees:* but where the goods are acquired and ſold ſubſequent to the bankruptcy, they may ſue in their own names. Though 13 *Eliz.* *c.* 7. *ſ.* 11. ſpeaking of perſonal as well as real property coming to the bankrupt, at any time before payment of his debts, directs, that "they ſhall be bargained, ſold, extended, delivered, "and uſed for and towards the payment of the ſaid creditors;" yet the words "bargained and ſold," can only apply to ſuch property as does not uſually paſs without conveyance: and accordingly it is ſaid by Lord *Hardwicke*, 1 *Atk.* 253. *ex parte Proudfoot*, "All the future perſonal eſtate is affected by the aſſignment, and "every new acquiſition will veſt in the aſſignees; but as to future "real eſtates, there muſt be a new bargain and ſale." The 1 *J.* 1. *c.* 15. *ſ.* 13. which is the next ſtatute empowering commiſſioners to aſſign, operates only on *debts* due to the bankrupt. The caſe of *Chippendale* v. *Tomlinſon*, *B. R. T.* 25 *G.* 3. *Cooke's Bankrupt Laws* 260. was an action for work and labour done. Plea, that the Plaintiff was a bankrupt. Replication, work done after the commiſſioner's aſſignment for the neceſſary ſupport of the Plaintiff and his family: rejoinder, no certificate: and demurrer thereupon. *Lord Mansfield* ſaid, "The aſſignees cannot let "out the bankrupt and contract for his labour." But there, if the bankrupt had recovered and reduced the damages into property, that property would have belonged to the aſſignees, as paſſing by the previous aſſignment. In order to ſupport trover, there muſt

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be right of property and right of poſſeſſion: as to the latter, the Plaintiff never can have had it, for the goods have always been in the hands of a third perſon: and as to the former, the aſſignees have a right paramount. Neither can he be ſaid to have had ſpecial property, for there is no caſe of ſpecial property, but where there has once been poſſeſſion, as in the caſes of a carrier or a bailee. Suppoſe the aſſignees were to ſue us for the goods, could we plead a judgment recovered? The caſe of *La Roche* Bart. and Others v. *Wakeman* and Others, *Peake's N. P.* 140. is againſt us. But that went upon the ſame principle as *Aſhley* v. *Kell*, 2 *Str.* 1207. where it was held that an uncertificated bankrupt had ſuch a property in future effects, as enabled him to tranſact and ſell to a *bonâ fide* purchaſer: which principle was queſtioned within theſe few days in the *King's Bench* (*a*), when the Court ſeemed to doubt whether an uncertificated bankrupt could give a title or maintain an action for any thing but the earnings of his labour. So in *Silk* v. *Oſborne*, *Eſpinaſſe's N. P. R.* 3 *vol.* 140. where the action was for work and labour and materials found, Lord *Kenyon* ſaid that the work and labour and materials were ſo blended together, as to become one joint cauſe of action: evidently confining it to the mere caſe of perſonal labour. If any claim by the aſſignees were neceſſary to prevent the bankrupt from maintaining his action, the diſtinction laid down between the produce of perſonal labour and other property would be nugatory: for the bankrupt might equally maintain an action in all caſes, until a claim were made by the aſſignees.

Runnington Serjt. for the Plaintiff. In anſwer to the arguments on the other ſide I ſhall only advert to the caſes on the ſubject. In *Chippendale* v. *Tomlinſon* an uncertificated bankrupt was held intitled to recover for work and labour done. In *Silk* v. *Oſborne*, which was an action for work and labour and materials found, Lord *Kenyon* ſaid, "that however the queſtion might be between the "bankrupt and his aſſignees, it did not lie in the mouth of third "perſons to ſet up the Plaintiff's bankruptcy as a defence." In *Evans* v. *Brown*, *Eſpinaſſe's N. P. R. vol.* 3. *p.* 170. the ſame principle was extended to the caſe of money lent and advanced, where it was held that the loan being ſubſequent to the bankruptcy, the money might have been earned by the bankrupt after his bankruptcy; and that if the law allowed him to maintain an action to recover what was due to him for labour, he was equally intitled to

maintain

(*a*) See *Webb* v. *Ward* and Another, 7 *T. R.* 297.

maintain one for the money ſo earned by his manual labour, which he might have lent to a third perſon. This would go the whole length of the preſent caſe, except as to the form of action. But it has been ſince expreſsly decided, that trover will lie by an uncertificated bankrupt, and that a defence of this nature does not lie in the mouth of a ſtranger. *La Roche* Bart. and Others v. *Wakeman* and Another.

EYRE Ch. J. What ſhall be done between the bankrupt and the aſſignees or creditors is one thing, and what between him and a ſtranger is another. This narrow ground, that the bankrupt has a right againſt every body but the aſſignees, which is maintained by authorities, is ſufficient to ſupport the verdict. It is not true, that in caſes of ſpecial property the party muſt once have had poſſeſſion in order to maintain trover; for a factor to whom goods have been conſigned, and who has never received them, may maintain ſuch an action. But this is not a caſe of ſpecial property, it is a ſtronger caſe; it is entire property, though defeaſible, or to ſpeak more correctly, liable to be diveſted. It is not competent to a third perſon to diſpute the bankrupt's title to recover, who, ſuppoſing his creditors had no claims upon him, would be intitled to his action, becauſe whether they have ſuch claims or not is nothing to the ſtranger. I confeſs the theory of the caſe inclines me to go further. The bankrupt laws principally and moſt directly relate to that eſtate which the bankrupt had at the time of the aſſignment; there are proviſions for taking the account and aſcertaining the eſtate of the bankrupt at the time of the aſſignment; I recollect no ſuch proviſion for the future effects; nor was it neceſſary, for where future effects are ſpoken of, they are ſuppoſed to be ſpecific effects to be ſpecifically conveyed by ſubſequent aſſignment, as was done in the caſe of *Tudway* v. *Bourn*, 2 *Burr.* 716. It is true, that unleſs the bankrupt's eſtate is ſufficient to pay twenty ſhillings in the pound, the creditor will be intitled to a ſatisfaction for his debt out of effects acquired ſubſequent to the firſt aſſignment. But it cannot therefore be ſaid that the property is not his own until ſuch aſſignment, or that it is not his own becauſe he is uncertificated. The operation of a certificate is ſimply to diſcharge the bankrupt from the old debts. A certificate is not like a pardon; it is not neceſſary to make him a new man. In my apprehenſion it could not be enough for a creditor or an aſſignee to ſay that he is uncertificated; even to intitle *them* to an aſſignment of future effects under the ſtatute, they muſt ſhew that they have debts unpaid;

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paid; *à fortiori* a ſtranger ought not to take advantage of his being uncertificated, which affords but a preſumption at moſt that there are debts unpaid. The bankrupt who has not obtained his certificate (which is all that is meant by the word uncertificated) ſtands on the footing of the 13 *Eliz. c.* 7.; by which, if the effects at the time of the bankruptcy are inſufficient to ſatisfy the creditors, his future effects are made liable to be aſſigned. That is but in the nature of an execution and is reaſonable, and the Court will give effect to the demands of the aſſignees or creditors, as long as any debts are due, in the mode pointed out by the ſtatute, but I think not otherwiſe. The hardſhip and inconvenience, nay, the injuſtice as it ſeems to me, of this diſabling doctrine, is enough to condemn it.

BULLER J. This is clearly a caſe of property acquired ſubſequent to the bankruptcy. *Evans* v. *Mann* and *Martyn* v. *O'Hara* were queſtions between the bankrupts and the aſſignees; all the other caſes agree very well with *Aſhley* v. *Kell.* There the Court thought that the bankrupt had a property in goods acquired after the bankruptcy, and might aſſign to a *bonâ fide* purchaſer. But the aſſignees may claim, and if they do, they ſhall ſucceed. So in *La Roche* v. *Wakeman*, Lord *Kenyon* ſaid, "If the aſſignees take any ſteps "to diſaffirm the title, they may do ſo; but if they do not, the "bankrupt being the oſtenſible owner, may convey a title, and it "is not competent to third perſons to object." Allowing that the aſſignees might demand the money, ſtill it would be no bar to this action. Why? becauſe a third perſon has treated with the bankrupt as capable of receiving credit. All the authorities go this length.

HEATH J. The 13 *Eliz. c.* 7. *ſ.* 7. directs that the future property of a bankrupt ſhall be "bargained, ſold, extended, delivered, and uſed for and towards the payment of the creditors." The antient practice was, for the commiſſioners to aſſign ſpecific parts of the bankrupt's property to each particular creditor: and the 5 *G.* 2. is the firſt ſtatute which directs the choice of aſſignees for the benefit of all the creditors. When it became the practice to make over all the property to the aſſignees, the general aſſignment was held ſufficient to paſs the future effects. But the queſtion here is not whether the bankrupt can ſell, but whether a ſtranger having purchaſed of him can diſpute his title. He has a defeaſible property, which none but the aſſignees can defeat. He is like an alien who may purchaſe lands and maintain an action for them,

unleſs

unleſs the crown interpoſe. The aſſignees may allow the bankrupt to trade, and will have a right to recover the fruit of his contracts.

ROOKE J. I am of the ſame opinion. If a ſtranger is under any difficulty about defending himſelf againſt the aſſignees in a ſubſequent action, he has only to give them notice of the firſt, and inquire whether they chooſe to defend it, and thereby he would be ſecured.

Rule diſcharged.

LOVERIDGE v. BOTHAM.

May 27th.

Delivery of an attorney's bill is concluſive evidence againſt an increaſe of charge in a ſubſequent bill on any of the items contained in it; and ſtrong preſumptive evidence againſt any additional items.

LE *BLANC* Serjt. having moved for the prothonotary's report in this caſe, it appeared that the Plaintiff had delivered a bill to the Defendant in 1793, for attorney's buſineſs done, previous to that time; in 1795 another bill was delivered for buſineſs done during the ſame period, into which many new items were introduced, and ſome of the former charges raiſed in amount. The prothonotary wiſhed to be informed how far he was to conſider the Plaintiff as concluded by the delivery of his firſt bill.

The Court ſaid that the delivery of the former bill was concluſive evidence againſt an increaſe of charge on any of the items contained in it, and ſtrong preſumptive evidence againſt any additional items; but that if errors or real omiſſions in the former bill could be proved, they ought to be allowed for: and directed the prothonotary to review on this line of diſtinction.

STABLES and Another v. ASHLEY and Others.

May 29th.

In proceſs not bailable, if the writ be joint and the declaration ſeveral, it is regular. *Secus* in bailable proceſs.

A RULE was obtained by *Shepherd* Serjt. on a former day, to ſhew cauſe why the proceedings in this action ſhould not be ſet aſide for irregularity. A *quare clauſum fregit* having been ſued out by the Plaintiffs againſt *Aſhley*, *Froſt*, and *Grignon*, and *Aſhley*'s attorney ſerved with a copy of the proceſs, he ſearched the Filazer's Book, and found a memorandum (*a*) of a warrant of attorney in the action againſt all three, and accordingly on the 3d of *May* entered one joint appearance for them, though he had authority from *Aſhley* only; on the 4th of *May* he was ſerved with a notice

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(*a*) 25 *Geo.* 3. *c.* 80.

of declaration; on the 5th he took it out of the office, and found that *Aſhley* was the only one of the three declared againſt.

Le Blanc Serjt. for the Plaintiffs contended, 1*ſt*, That as it was not a bailable proceſs, the proceedings were regular, and cited *Yardley* v. *Burgeſs*, 4. *T. R.* 697. in the note, and *Spencer* v. *Scott* decided in this term (*b*); 2*dly*, That if there were any irregularity, it had been waived by the Defendant's taking the declaration out of the office; and 3*dly*, That the Defendants' attorney was equally irregular with the Plaintiffs, having entered a joint appearance for all three, when authoriſed by one only.

Shepherd contrà inſiſted that the writ and appearance being joint, and the declaration ſeveral, there was no proceſs to warrant it; that the caſe of *Spencer* v. *Scott* went upon the poſſibility of the additional Defendant's being a fictitious perſon like *John Doe*, but here the ſervice included all three; that taking a declaration out of the office is a waiver of irregularity in the proceſs, becauſe the Defendant is acquainted with that before he goes to the office, but not of irregularity in the declaration, for he muſt take out that before he can aſcertain whether it be irregular or not: he added, that by the preſent mode of proceeding the revenue would be defrauded.

Per curiam. The attorney has taken upon himſelf to enter an appearance for three, having an authority from one only; the Court therefore, if neceſſary, might cure the whole irregularity by ſetting aſide the appearance as to two of the Defendants, and letting it ſtand for *Aſhley* only. Unleſs we found ourſelves bound by the ſtricteſt authorities, we would not countenance ſuch an objection as this; but the practice ſeems againſt this objection; the diſtinction is between proceſs bailable and not bailable; in the latter a declaration may be delivered againſt one, though any number be mentioned in the writ, and no inconvenience can reſult from it; we will not diſtinguiſh between *John Doe* and a real Defendant, in order to raiſe an objection.

Rule diſcharged without coſts.

(*b*) Suprà, page 19.

1797.

C A S E S

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS

IN

Trinity Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

NORTH qui tam v. SMART.

June 19th.

In compounding a penal action on the poſt-horſe-act, (which gives coſts to the proſecutor,) the proſecutor was allowed to receive the deficient duties (not amounting to 40*s.*) and full coſts of ſuit, though together exceeding the 40*s* paid to the Crown.

A *QUI TAM* action having been brought on the 20 *Geo.* 3. *c.* 51. for ſending in falſe accounts to the farmers of the duties on poſt-horſes;

Le Blanc Serjt. on a former day moved for leave to compound on payment of 40*s.* to the Crown, and ſuch duties as were deficient in conſequence of the fraud (which did not amount to 40*s.*) together with the coſts of the action to the proſecutor.

Shepherd Serjt. ſaid he was inſtructed to conſent.

But the Court ſeemed to doubt whether, as the deficient duties, together with the coſts of the action, would amount to more than the 40*s.* paid to the Crown, the compoſition could be allowed, and it ſtood over.

On this day *Le Blanc* mentioned it again, and ſaid that he had looked into the act, and found that the proſecutor was allowed the full coſts of ſuit; and therefore that the value of the coſts could not be conſidered as a part of the compoſition.

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Accordingly, the Court gave leave to compound, and ſaid that as the act was made for the benefit of the farmers of the poſt-horſe duties, it was not unreaſonable that they ſhould make the compoſition on their own terms. Beſides with reſpect to coſts, this was not like other popular actions.

June 20th.

EVANS *v* GILL.

The Court will ſet aſide a regular judgment, on an affidavit of merits, though bankruptcy is intended to be pleaded.

MARSHALL Serjt. ſhewed cauſe againſt a rule for ſetting aſide a regular judgment on an affidavit of merits, upon the ground that the Defendant meant to plead his bankruptcy. This is not more a plea of merits than infancy, coverture, uſury, or the *Statute of Limitations*: and in thoſe caſes the Court has refuſed ſimilar applications (*a*). Bankruptcy is not a meritorious, but a mere legal defence, againſt a conſcientious claim; it is not ſuch a diſcharge but that a previous debt may be a conſideration for a new promiſe, as in caſes of infancy, and the *Statute of Limitations*.

Sed per Curiam. Suppoſing this to be a fair bankruptcy, we ſhould permit the party to make uſe of it as a defence; when he has given up all his effects, it would be cruel to charge him from a neglect in the attorney; the neceſſary conſequence of which would be, that he muſt go to gaol. In all caſes of fair bankruptcy, we think the party ſhould have an opportunity of taking advantage of it.

Rule abſolute on payment of coſts.

(*a*) Vid. *Forbes* v. Lord *Middleton*, *Str.* 1242. and *Willett* v. *Atterton*, *Bl.* 35.

June 22d.

Buck, Leſſee of **Whalley** Clerk and Wife, and Another *v.* **Nurton**.

Lands uſually occupied with a houſe, will not paſs under a deviſe of "a "meſſuage, "with the "appurtenances," unleſs it clearly appears that the teſtator meant to extend the word "appurtenances" beyond its technical ſenſe.

This was an ejectment to recover ſixty-four acres and a half of land, conſiſting of a park, meadow land, paſture land, and orchards, tried before *Buller* J. at the laſt *Lent* aſſizes for the county of *Somerſet*, when the Jury found a verdict for the Plaintiff, ſubject to the opinion of this Court upon the following caſe:

Edward Clarke, deceaſed, being ſeiſed (among other things) of the premiſes in queſtion, did, by his laſt will duly executed, and bearing date the firſt day of *November* in the year of our Lord 1794, deviſe (amongſt other things) as follows:

"I give and deviſe unto my truſty and well-beloved friend *John Nurton*, of *Milverton* in the county of *Somerſet* aforeſaid, Gentleman, (*and who was acting for the teſtator, at his death, as his ſteward,*) his heirs and aſſigns, all that meſſuage and farm called *Blagroves*, and the ſeveral pieces and parcels of land therewith held and enjoyed, ſituate, lying, and being in the pariſh of *Milverton* aforeſaid, and now in the occupation of *Jonas Chorley*; alſo all that cloſe, piece or parcel of meadow or marſh ground, called *Great Crook*, ſituate, lying, and being in the pariſh of *Bawdripp* in the ſaid county of *Somerſet*, and now in the occupation of *John* and *Richard Langdon*; to hold the ſaid meſſuage or tenement and farm, lands, hereditaments, and premiſes, with their reſpective appurtenances, unto the ſaid *John Nurton*, his heirs and aſſigns for ever."

Having then given certain legacies and annuities, he further gives and deviſes as follows:

"I give and deviſe unto my good friend and relation *Elizabeth Whalley*, wife to the ſaid *Thomas Sedgwick Whalley*, (the ſaid *Elizabeth Whalley* being one of the coheirs of the teſtator,) *all that my capital manſion-houſe wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances:* and alſo all that my manor or lordſhip of *Chipley*, and all other my manors or lordſhips, meſſuages, farms, land, tenements, hereditaments, and premiſes, as well freehold or fee-ſimple, as copyhold and cuſtomary, whereof I have a diſpoſing power; except the meſſuage, or

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"tenement, and farm, lands, hereditaments, and premiſes herein-"before deviſed to the ſaid *John Nurton*, ſituate, lying, and be-"ing in the ſaid county of *Somerſet*, or elſewhere in the king-"dom of *Great Britain*; to hold the ſame unto the ſaid *Elizabeth* "*Whalley*, for and during the term of her natural life, to and "for her ſole and ſeparate uſe, with power for the ſaid *Elizabeth* "*Whalley* to cut and fell timber for the neceſſary repairs of the "ſaid premiſes only: and from and immediately after her de-"ceaſe, I give and deviſe my ſaid capital manſion-houſe, manors, "meſſuages, farms, lands, tenements, hereditaments, and premiſes, "with the appurtenances, unto the ſaid *John Nurton*, his heirs "and aſſigns for ever: alſo I give, deviſe, and bequeath unto the "ſaid *Elizabeth Whalley*, all my leaſehold meſſuages or tenements, "lands, and premiſes, in the ſaid county of *Somerſet*, or elſe-"where; to hold unto the ſaid *Elizabeth Whalley* for ſo many "years of my term, eſtate, and intereſt therein as ſhall run out and "expire in her lifetime, to and for her own ſole and ſeparate uſe "and benefit: and from and immediately after her deceaſe, I give "deviſe and bequeath the ſame leaſehold meſſuages, or tenements, "lands, and premiſes unto the ſaid *John Nurton*, his executors, "adminiſtrators, and aſſigns, for all the reſidue of my term eſtate "and intereſt that ſhall be therein then to come and unexpired. "And it is my expreſs will and deſire, and I do hereby direct, "that the ſaid *John Nurton ſhall hold and enjoy my ſaid capital* "*manſion-houſe, with the appurtenances, for the ſpace of one year next* "*after my death.* I give, deviſe, and bequeath unto the ſaid "*Thomas Sedgwick Whalley*, in caſe he ſhall ſurvive his wife, the "ſaid *Elizabeth Whalley*, the ſum of one thouſand pounds, to be "iſſuing and payable out of the eſtates hereinbefore deviſed to "the ſaid *Elizabeth Whalley* for life, and to be paid by the ſaid "*John Nurton* at the end of twelve calendar months next after "her death. All the reſt, reſidue, and remainder of my perſonal "eſtate, and effects whatſoever and whereſoever, and of what "nature or kind ſoever, after payment of all my juſt debts, fu-"neral expences, and legacies hereby given, I give, deviſe, and "bequeath unto the ſaid *John Nurton*, his executors, adminiſtra-"tors, and aſſigns. And I do hereby *make, conſtitute, and appoint* "*him, the ſaid* John Nurton, *whole and ſole executor of this my will*, "hereby revoking all former wills by me at any time heretofore "made; and do make and declare this to be and contain my laſt "will and teſtament."

The teſtator died on the 28th of *March* 1796, *having for many years previous to and at his death conſtantly occupied all the premiſes above mentioned*, (which were enumerated in a ſchedule prefixed to the caſe,) *with his ſaid capital manſion-houſe*, and the gardens and pleaſure-grounds of *Chipley*; which include the parlour-garden, the herb-garden, the pond-garden, the old houſe-garden, the arbour-garden, the ſhrubbery, the limetree-grove, and a court adjoining, and the public and private walks or road-ways, one of the latter of which was through the park to *Chipley Houſe*, beſides a back court, and other curtilages.

The queſtion for the opinion of the Court was, Whether the leſſors of the Plaintiff, or any of them, were entitled to recover all or any, and what part of the above-named premiſes; and whether they, or any of them, paſſed to *John Nurton* by the clauſe which directs that he is to have the manſion-houſe, with the appurtenances, for a year after the teſtator's death?

Le Blanc Serjt. for the Plaintiff. The 1ſt queſtion is, What is the true ſignification of the word "appurtenances?" the 2d, What is the intention of the teſtator, as it appears on the face of the will? The ſtrict technical ſenſe of the word "appurtenances" is confined to buildings, curtilage, and garden belonging to the houſe. In old times indeed, there was a queſtion as to the latter. A deviſe of a meſſuage with the appurtenances, does not include lands uſually occupied with the houſe: only ſuch as are immediately neceſſary to the enjoyment of it. *Bro. Abr. Feoffment of Lands*, *pl.* 53. *Bettiſworth*'s caſe, 2 *Co.* 32. *Hearne* v. *Allen*, *Cro. Car.* 57. *Hutton* 85. S. C. This laſt caſe was on a will, the two former were on deeds. But notwithſtanding the general rule, if it appear to be the obvious intention of the teſtator, that lands generally occupied with the houſe ſhould paſs, the Court would conſtrue the word "appurtenances" contrary to its ſtrict technical ſenſe, ſo as to carry the lands to the Defendant. The teſtator here was poſſeſſed of a manſion-houſe, together with parcels of land, amounting to about ſixty-four acres and a half; there were gardens, ſhrubberies, public walks and ways, which might well come under the word "appurtenances," and it is not contended by the leſſors of the Plaintiff that they did not paſs: they were ſufficient to ſatisfy the word "appurtenances," without the additional lands. The teſtator was well aware of the diſtinction between appurtenances to the manſion-houſe, and lands occupied with the manſion-houſe; for in every clauſe, except the laſt, (which is the one in queſtion,) he deſcribes the particular premiſes which are intended

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to paſs, and afterwards adds the word "appurtenances." So in the deviſe to *E. Whalley* the words are, "all that my capital manſion-"houſe wherein I now live, and the lands and grounds thereto "belonging, and therewith held and enjoyed, *with the appurte-"nances*;" but in the laſt or directory clauſe, when he takes out of the deviſe to *E. Whalley* what was intended to be given to the Defendant for a year, he drops the words which deſcribe the lands occupied, and ſays only, "manſion-houſe, with the appurtenances." Beſides, it is to be conſidered that the Defendant had been ſteward to the deviſor, and was by will appointed his executor; it was neceſſary, therefore, that he ſhould have acceſs to all the papers of the deviſor, with as much facility as poſſible: this could be beſt afforded him by the deviſe of the manſion-houſe for a year, with what was neceſſary to its actual enjoyment; but a beneficial intereſt in the lands round it could not come within the ſame view.

Williams Serjt. for the Defendant. It is manifeſt from the will, that every thing was meant to paſs. If that intent can be ſhewn, it is admitted that the words are large enough. But ſome caſes may be cited, to ſhew that *ex vi termini* more will paſs by the word "appurtenances" than has been ſtated on the other ſide. In *Higham* v. *Baker*, *Cro. Eliz.* 16. *Anderſon* Ch. J. ſays, "That "land ſhall paſs as pertaining to a houſe which hath been occu-"pied with it by the ſpace of ten or twelve years; for by that "time it hath gained the name of parcel, or belonging, and ſhall "paſs with the houſe by that name in a will or leaſes." The ſame doctrine is laid down in *Loft* v. *Baker*, 2 *Rolle's Rep.* 347. So by the caſe of *Yates* v. *Clincard*, *Cro. Eliz.* 704. it appears, that lands may paſs under the words, "houſe, with the appurtenances." In *Boocker* v. *Samford*, *Cro. Eliz.* 113. a deviſe of a "tenement, "with the appurtenances, in which *H. B.* dwelleth in *Ebley*," was held to paſs lands out of *Ebley* which had been uſed with the tenement by the ſpace of ſixty years, and had always paſſed by one grant, and under one rent. And in the preſent caſe the lands in queſtion had been for many years conſtantly occupied with the houſe. The ſtrongeſt caſe in favour of the Plaintiff is *Smithſon* v. *Cage*, *Cro. Jac.* 526.; but that was a caſe of ſurrender of copyhold, which is conſtrued as ſtrictly as a deed. But even there, the *orchards* were held to paſs. By *Hill* v. *Graunge*, *Plowd. Com.* 170. it appears that the terms "appertaining to the meſſuage" may, even in a deed, ſignify lands uſually occupied with the meſſuage. As to the queſtion of intent, it has been ſaid, that if the teſtator had meant the lands to paſs, he would have deſcribed them: and the circumſtance of the deſcription being inſerted in the former clauſe, and omitted in the latter, has been relied on. But the words, " houſe with the appurtenances," in the directory clauſe, refer to the former deſcription, and ſhew that the Defendant ſhould take in the ſame manner as *E. Whalley*. The caſes of *Doe* v. *Collins*, 2 *Term Rep.* 498. and *Blackborne* v. *Edgley*, 1 *P. Wms.* 600. prove that very little is ſufficient to paſs lands occupied with the houſe, where it appears to have been the intention that they ſhould paſs.

Le Blanc in reply was ſtopped by the Court.

EYRE Ch. J. I have no doubt upon the caſe, unleſs it be with reſpect to the orchards. Lands will not paſs under the word " appurtenances" taken in its ſtrict technical ſenſe: they will paſs if it appears that a larger ſenſe was intended to be given to it. If the Courts had always adhered to this line of conſtruction, many reported caſes would not now diſgrace the books. Every teſtator ought to be ſuppoſed to take legal words in a legal ſenſe, unleſs, according to the marginal note to the caſe in *Hobart* (*a*), there be demonſtration plain of an intent to uſe them in a different ſenſe. In the former part of the will there is a deviſe of a houſe with lands in terms expreſs, to which is added, " with the appurtenances," in order to comprize all which might not fall within the deſcription. Then follows a declaration that the Defendant ſhall have for one year ſomething which was included in the above deviſe. The teſtator muſt be ſuppoſed to have underſtood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have uſed them. Suppoſe there had been nothing ſtated to let us into the intention of the teſtator, but the mere deviſe to the Defendant, we muſt have examined what was occupied by the teſtator; and if we had found a houſe ſituated in a park which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the teſtator to paſs the whole together. There, if nothing to the contrary had appeared, we might have ſuppoſed the teſtator to have uſed the word " appurtenances" in a ſenſe different from its technical ſenſe. But this is not that caſe. It is true that the premiſes were occupied for a conſiderable time together with the houſe: but firſt, the whole of the premiſes are not neceſſarily connected; in the next place, there is here ſolid ground to argue, that the teſtator

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(*a*) *Hob.* 33. The note is—No man ſhall ſhew me a caſe in law, where by purchaſe by deviſe to an heir, any may take that is not heir indeed, without declaration plain.

underſtood the meaning of the words employed in the deviſe, having ſometimes uſed the word " lands" as a part of the deſcription, and ſometimes dropt it. The Defendant being the teſtator's executor, and having been his ſteward, affords a fair ground of argument. The teſtator gave him the excluſive enjoyment of the manſion-houſe, " *with the appurtenances*," for one year only, after having deviſed the manſion-houſe and lands alſo " *with the appurtenances*," to Mrs. *E. Whalley* for her life, with remainder to the Defendant. Now with what view was this done? Moſt probably for the convenience of the Defendant in the execution of the duty impoſed upon him. The general intent, therefore, as collected from the deviſe, and the relation in which the deviſee ſtood to the teſtator, does not call upon us to go beyond the ſtrict rule in conſtruing the technical word " appurtenances."

Heath J. I am of the ſame opinion. We ought to adhere to the ſtrict technical ſenſe of the word " appurtenances." For though the intention is not clearly expreſſed, why the Defendant ſhould have the manſion-houſe at all, yet it appears, that he was executor and reſiduary legatee; and as ſuch was intitled to the ſtock, the arrears of rent, the furniture, &c. A year's occupation therefore was given him, to ſettle his accounts, and collect what belonged to him. He ought to have the houſe, and what comes within the ſtrict ſenſe of the word " appurtenances." Beſides, this may be diſtinguiſhed from the caſes cited, for it is a ſeparation of the premiſes for a year only, whereas in ſome of the other caſes it was for a great length of time, and in ſome perpetual, which might induce the Court to lean againſt it.

Rooke J. I am of the ſame opinion.

The poſtea to be delivered to the Plaintiff for all the premiſes except the orchards.

June 27th.

Morgan Aſſignee of the Sheriff *v.* Sargent one of the Bail of Owen.

If a declaration on a bail-bond conclude: " Whereby " an action " hath accrued to the Plaintiff to demand and have of the *principal*" (inſtead of the bail), and ſtate non-payment by the *principal*; it is bad on a ſpecial demurrer.

The declaration, after ſtating the writ, the arreſt, the non-appearance, and the aſſignment of the bail-bond, proceeded thus: " By reaſon of which ſaid premiſes, and by force of the " ſtatute, &c. an action hath accrued to the ſaid *T. Morgan* as

" aſſignee, &c. to demand and have of the ſaid *T. Owen* the ſaid " ſum of 40*l.* above demanded. Nevertheleſs the ſaid *T. Owen*, " although often required, hath not paid," &c. inſerting *Owen's* name for that of the Defendant.

To this there was a ſpecial demurrer, aſſigning for cauſe that " it " is not averred, or ſhewn in or by the ſaid declaration, that the " ſaid *R. Sargent* hath been guilty of any breach of the condition; " that it no where appears that the ſaid *R. Sargent* hath neglected " or refuſed to pay the money, or that payment thereof has ever " been demanded of the ſaid *R. Sargent*; and that no ſufficient " cauſe of action is any where ſtated or ſhewn to have ariſen, or " accrued to the ſaid *T. Morgan* againſt the ſaid *R. Sargent*."

Joinder in demurrer.

Shepherd Serjt. in ſupport of the demurrer. It is conſiſtent with the allegations in the declaration, that *R. Sargent* may have paid the money; the latter part of the declaration cannot be rejected, for there never was a declaration on a bail-bond ending with a ſtatement of the aſſignment; and the Court cannot ſubſtitute *R. Sargent* for *T. Owen.*

Marſhall Serjt. *contrà.* The ſpecial demurrer ought to have alleged that the declaration had ſtated non-payment, by *T. Owen* inſtead of *R. Sargent*; and the averment in the beginning of the declaration, " owes to, and unjuſtly detains," ſufficiently ſhews a cauſe of action and non-payment by the Defendant.

Shepherd in reply. The averment in the beginning of the declaration is a mere concluſion of law, and only ſhews that the debt was once owing; but the Plaintiff muſt ſhew how it is owing, and that there is a debt, and detainer at the time of the action brought.

EYRE Ch. J. Is it not ſhewn that the debt and detainer were exiſting at the time of the declaration, ſince the record begins with " was ſummoned to anſwer *J. M.* in a plea that he render to the " ſaid *J. M.* 40*l.* which he owes to, and detains," &c.? You muſt argue it as a mere point of form; if you attempt to argue on the ſubſtance, you muſt fail. This is a ſlip in form; but it is always the beſt way to make the party pay for this kind of ſlip, if advantage is taken of it by ſpecial demurrer. Infinite miſchief has been produced by the facility of the Courts in overlooking theſe errors: it encourages careleſſneſs, and places ignorance too much upon a footing with knowledge among thoſe who practiſe the drawing of pleadings. The averment of " often requeſted" is

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an eſtabliſhed form, and I think a neceſſary form: had the Courts even determined it to be ſubſtance, I ſhould have had no objection; for many actions might have been avoided, if requeſt had actually been made. The party, if he will not amend, but will join in demurrer, muſt pay for his blunder.

The other judges aſſenting,

Judgment for the Defendant.

June 28th.

SABINE *v.* ELIZABETH JOHNSTONE.

If a replication to a plea in abatement of the writ begin, "that "the ſaid "declaration "ought not "to be quaſhed," but conclude properly, it is well enough; for ſuch words may be rejected as ſurpluſage.

ASSUMPSIT.—Plea in abatement of the writ: That *Eliza Allen Johnſtone*, who is impleaded by the name of *Elizabeth Johnſtone*, was baptized by the name of *Eliza Allen*, and had always been called and known by the name of *Eliza Allen*, *without this*, that ſhe had ever been called or known by the name of *Elizabeth*: and prays judgment of the writ. Replication: That *the ſaid declaration ought not to be quaſhed*, by reaſon of any thing in the ſaid plea above alleged: becauſe the ſaid *Eliza Allen Johnſtone*, who now appears to the original writ and declaration, is the ſame perſon againſt whom the Plaintiff ſued out his writ, and was at that time, and ſtill is, called and known, as well by the name of *Elizabeth* as by the chriſtian name of *Eliza Allen*. Concluding to the country. To this there was a ſpecial demurrer, aſſigning for cauſe: That the Plaintiff in his replication has not ſhewn any reaſon "why the ſaid *writ* of the ſaid Plaintiff, of which the ſaid *Eliza* "*Allen* hath above prayed judgment, ſhould not be quaſhed: but "on the contrary thereof hath alleged that his ſaid *declaration* "*ought not to be quaſhed*; to which ſaid declaration the ſaid *Eliza* "*Allen* hath not pleaded, nor is ſhe bound to plead; inaſmuch as "the ſaid declaration cannot be good or ſufficient in law, if the "ſaid writ of the ſaid Plaintiff is quaſhed: and for that the matter "alleged by the Plaintiff in his replication ſhould, if true, have "been pleaded in ſupport of his ſaid writ, and not of his ſaid declaration," &c.

Joinder in demurrer.

Marſhall Serjt. in ſupport of the demurrer. It is a principle in pleading, that the conſequence intended to be drawn by one party muſt be excluded by the anſwer of the other. Here the Defendant ſays that ſhe is miſcalled in the *writ*, and that it ought to be quaſhed. The Plaintiff in reply ſays, that the *declaration* ought not to be quaſhed, though the Defendant has not alleged that it ought. Suppoſe a judgment that the *declaration* ſhould be quaſhed, yet the writ would remain, and then the Plaintiff could not bring a new action: for he muſt declare on the ſame writ as long as it remains. Now if he declared on the ſame writ, in the ſame manner, the ſame objection would lie; and if in a different manner, there would be a variance between the writ and the declaration.

Runnington Serjt. *contrà* was ſtopped by the Court.

Eyre Ch. J. I think the rules of pleading ought to be maintained; but I cannot but conſider this as a frivolous objection. The plea is right in praying that the writ may be quaſhed; and the replication is right: it is an anſwer by matter of fact, and not by matter of law: it ſtates that the Plaintiff was called and known by one name as well as the other, and concludes to the country. If the Plaintiff had prayed judgment, "if the declaration ought to "be quaſhed," it might have altered the caſe: but the anſwer on which the Plaintiff has relied, is an anſwer of fact. Then what is the conſequence? If that fact had been tried, and found for the Defendant, the judgment would have followed the prayer of the plea. As to the beginning of the replication, it does not ſignify whether it ſays that the declaration or the writ ought to be quaſhed, or whether it ſays neither. If the Plaintiff had ſimply replied; That the Defendant was called and known, &c. and concluded to the country, it would have been ſufficient, and the iſſue would have been well joined. It is therefore a ſurpluſage form.

Heath J. Of the ſame opinion.

Rooke J. Of the ſame opinion.

Judgment for the Plaintiff.

MEDDOWSCROFT One, &c. v. SUTTON and Another, Executors of BOWEN.

July 3d.

If bail be ſerved with proceſs on his recognizance, and die before the *quarto die poſt*, and freſh proceſs iſſue againſt his executors; they have until the *quarto die poſt* of the ſecond writ to ſurrender the principal.

Bowen was ſerved with an attachment of privilege on a recognizance of bail, but died before the *quarto die poſt*; until which day he had time to ſurrender the principal: the Plaintiff then ſerved the Defendants with an attachment of privilege, and before the *quarto die poſt* of that writ the principal was ſurrendered.

Shepherd Serjt. having obtained a rule to ſhew cauſe why the proceedings againſt the Defendants ſhould not be ſtaid, on payment of coſts;

Cockell Serjt. ſhewed cauſe. The ſurrender was inſufficient. *Bowen*'s death made no difference: his executors could not be in a better ſituation than himſelf, and the principal ſhould have been ſurrendered by the *quarto die poſt* of the firſt writ.

Shepherd Serjt. *contrà.* The bail could not be fixed until the fourth day after the return of the writ; now he died on the firſt day: if he had lived he might have relieved himſelf; the executors therefore are not ſued as the executors of bail fixed in his lifetime, and muſt be in the ſame ſituation as if no action had been brought againſt their teſtator. *Hoare* v. *Mingay*, 2 *Str.* 915. Though the ſtaying proceedings on a ſurrender before the *quarto die poſt* was formerly *ex gratiâ*, it is now become a matter of right.

Per Curiam (after looking into the caſe of *Hoare* v. *Mingay.*) The caſe in *Strange* has eſtabliſhed this rule: That if the principal is ſurrendered within four days after the return of that writ in which there is an effectual proceeding, it is ſufficient. The former ſuit was as much done away in this caſe by *Bowen*'s death, as in *Hoare* v. *Mingay*, by the action being brought in the wrong court: the ſufficiency of the ſurrender within the *quarto die poſt*, is a privilege to the party ſued, to which the executors of the bail are as much intitled as the bail himſelf.

Rule abſolute.

July 5th.

Ex parte ANSELL and Another.

If an annuity-deed contain a proviſo that the grantor ſhall repurchaſe, the memorial of ſuch deed muſt ſtate the proviſo and the terms and conditions of redemption; if it only refer to the deed, and ſtate the annuity to be redeemable "on ſuch notice, terms, and conditions as are therein expreſſed," it does not ſufficiently comply with the 17 *G.* 3. *c.* 26. *ſ.* 1.

C. ANSELL and *S. W. Fores* granted an annuity to *E. Boulton*, and gave a bond, warrant of attorney, and annuity-deed to ſecure it. The deed *contained* a proviſo of redemption. The memorial ſtated the bond and warrant of attorney properly, but deſcribed the proviſo of redemption as follows: "and in the ſame "indenture is contained a certain proviſo or agreement, impowering the ſaid *C. Anſell* to repurchaſe the ſaid annuity upon ſuch "notice, terms, and conditions as are therein expreſſed."

Williams Serjt. on the part of the grantors, on the firſt day of *Eaſter* Term, obtained a rule to ſhew cauſe, why the "bond, the "warrant of attorney, and the deed, ſhould not be delivered up to "be cancelled."

The ground of his motion was that the memorial had ſet forth the proviſo of redemption in too general a way (*a*). He cited *Steadman* v. *Purchaſe*, 6 *T. R.* 737. to ſhew that a memorandum *indorſed on the deed*, importing that the grantor might redeem on terms, muſt be inſerted in the memorial: and *Appleton* v. *Smith*, *H.* 37 *G.* 3. in *Scacc.*, where it was held equally neceſſary, though the proviſo was contained in the *body* (*b*) of the deed.

Shepherd Serjt. ſhewed cauſe. Though it has been held that a proviſo of redemption ought to be inſerted in the memorial, it has never been deemed neceſſary to ſtate it verbatim. A proviſo of redemption is a part of the *conſideration*, and there is a difference between the firſt clauſe which relates to ſetting out the *deed*, and the ſecond clauſe, which relates to ſetting out the *conſideration*. The former requires the day of the month and year when the deed bears date, with other particulars to be ſpecified; the latter only a general deſcription. Unleſs this be ſufficient, the whole deed muſt be ſet out; the days of payment and the remedy, as whether by diſtreſs or otherwiſe. The clauſe of redemption is ſtated generally, referring to the deed for particulars.

Williams in ſupport of the rule. The proviſo of redemption forms part of the terms of the agreement on which the annuity is granted: and there is no difference in ſenſe, whether ſuch proviſo be totally omitted in the memorial, or only generally inſerted, as in the preſent caſe. The deed is in the cuſtody of the grantee; it is neceſſary therefore that the memorial ſhould contain the facts eſſential to be known to the grantor. From this memorial he can only learn that he has the power of redemption, but not the terms on which he can redeem. If the Courts have been right in inſiſt-

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(*a*) Another objection to the memorial was taken by *Williams* Serjt. *viz.* that it was therein ſtated, that the conſideration was paid by "*E. Boulton or* her ſolicitor," in the alternative; and for this was cited the opinion of Lord *Loughborough*, in Duke of *Bolton* v. *Williams*, 4 *Bro. Chan. Caſ.* 309. where it is ſaid, that "the actual mode and manner of payment is neceſſary to be ſtated in the *memorial*;" but this was agreed to be a miſtake in the report: and *Eyre* Ch. J. ſaid, "That the *deed* muſt expreſs by whom the conſideration was paid, but not the *memorial*." *Vide* alſo *Dalmer* v. *Barnard*, 7 *T. R.* 248.

(*b*) See alſo to this effect *Harris* v. *Stapleton*, 7 *T. R.* 205. But where an agreement was made at the time of the grant, that the grantors ſhould have a power of redemption, which agreement was not then reduced to writing; but after the memorial had been inrolled, was indorſed on the bond; the Court of *K. B.* were of opinion that the third ſection of the act, which requires the conſideration to be ſtated in every *deed*, &c. could not be extended to a power of redemption *intended* to be reſerved to the grantor. And though it had been objected for the Defendant, that ſuch an agreement ought to have been ſtated in the *memorial*, the Court directed the counſel for the Plaintiff to ſpeak to another point. *Dalmer* v. *Barnard*, 7 *T. R.* 250.

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ing that the memorial muſt ſtate the proviſo, it ought alſo to contain the terms.

Eyre Ch. J. If the 17 *Geo.* 3. *c.* 26. had gone no further than the firſt clauſe, we muſt have looked to the import of the words of that clauſe; and the practice of the Regiſter Counties. There they enter no more than a memorandum, containing the names of the parties, the dates, the premiſes, and perhaps the conſideration. I do not know how *ex vi termini* or on analogies we can ſay that more was intended here. The Legiſlature has ſaid what ſhall be inſerted; namely, the date, the names of the parties, and for whom they are truſtees, the witneſſes, the annual ſum, the name of the perſon for whoſe lives the annuity is granted, and the conſideration or conſiderations. Now, unleſs under the word "conſiderations," I cannot ſay that the terms of the proviſo are included. I ſhould incline to go ſome length for the ſake of general utility to decide that the terms muſt be ſet out in the memorial, but I doubt whether the act requires it. The word "conſiderations," in the act, may mean mere money conſiderations. In the caſe where the Courts have held it neceſſary to inſert the proviſo of redemption in the memorial, it has been indorſed on the deed: and has therefore been conſidered either as a ſeparate deed or as ſomething collateral to the deed itſelf, and eſſential to be ſet out as a ſuperadded part of the ſecurity. In the caſe of a proviſo in the body of the deed, I doubt whether on the general idea of a memorial, or the ſpecific deſcription of it in this act, it need be inſerted. I am not therefore prepared at preſent to conſider this memorial as inſufficient. It is a memorial only, not a copy of the deed: it ſtates a deed for ſecuring an annuity redeemable "on the terms therein expreſſed:" for which reference may be had to the deed itſelf. Is not this a ſufficient compliance with the words of the act? He who ſees an annuity redeemable, will inquire after the deed, and look into the terms. It has been ſtated that the act was made for the benefit of the grantor, who has parted with the deeds: I cannot ſubſcribe to that propoſition: it was made for the benefit of mankind in general, that the world might know the nature of ſuch tranſactions, and the parties be reſtrained by a ſenſe of ſhame from entering into them. The policy of the law would be amply ſatisfied by a memorial like the preſent; it anſwers all ſubſtantial purpoſes, for it cannot be neceſſary to load it with the full contents of the deed which would be little ſhort of requiring a copy. But if my Brothers ſhould be of a different opinion, I ſhould wiſh to take time to conſider.

BULLER J. I have conſiderable doubts upon this queſtion: and cannot quite coincide in the opinion of my Lord. I ſhould ſooner ſay that the proviſo need not be inſerted at all, than that it ſhould be inſerted in this general way. The queſtion is, whether the proviſo be part of the conſideration or not. Look through the act. It was there intended to include *money* conſiderations only, and one clauſe actually ſays "in money only." If then the word "conſiderations" means money conſiderations only, a proviſo is not within the terms of the act. But the point has been already ſettled, both here and in the *King's Bench*, and I am not diſpoſed to diſturb what has been ſettled by two determinations, though the act does not appear to go that length. Having got thus far, that the word "conſiderations" includes all the terms of the agreement, the remaining queſtion will be, Whether the preſent proviſo be ſufficiently ſtated? I admit no difference between the caſe of a proviſo indorſed, and a proviſo in the body of the deed. They are both parts of the agreement. So in a warrant of attorney with a defeaſance, the defeaſance is a part of the inſtrument. If then the proviſo is to be taken notice of at all, is it not to be taken notice of ſubſtantially? The act in my opinion was made for the benefit of the grantor, as well as the public. Let us ſee then if this memorial be ſufficient to protect the grantor, againſt any improper advantages which might be attempted. He knows the annuity to be redeemable, but the deeds are in the hands of the grantee. Is it not then material for him to know the terms on which it is redeemable: as whether at the end of three or at the end of ſeven years? Is it not of importance that he ſhould have it in his power to prove all the material facts out of the mouth of the party himſelf: that he may be able to come to the Court, ſtate the ſpecific terms, and demand the deed on compliance with the proviſo? The terms therefore not being inſerted, I think the proviſo inſufficiently ſtated, and if ſo, that the annuity ſhould be ſet aſide.

HEATH J. I have great doubts upon this queſtion. There is no analogy between the regiſter acts and the 17 *G.* 3. The former were made for the benefit of purchaſers: the latter to throw a fence about the grantors of annuities, who are uſually incautious and extravagant. What my Brother *Buller* has ſaid appears extremely forcible, that the grantor ought to know the preciſe terms on which the annuity is redeemable: he would otherwiſe be left in great doubt and difficulty, unleſs he has kept a copy of the deed, which is rarely done. As it has been held neceſſary to regiſter a proviſo, it muſt be ſhewn on what terms the proviſo is to take effect: and I ſee no difference between a proviſo inſerted in the body of the deed, and one indorſed on the back of it.

ROOKE J. I am inclined to think the memorial inſufficient. The proviſo is a part of the conſideration. Every circumſtance in favour of the grantor is a part of the conſideration; for all ſuch circumſtances form the ground of the grant, and if every ſuch circumſtance be a part of the conſideration, it ſhould be ſo ſpecifically ſtated, that the grantor may know clearly what the terms of the agreement are. "On the terms therein expreſſed," is not a ſatisfactory ſtatement. I think however that this matter requires further conſideration.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

EYRE Ch. J. We have conferred with all the Judges on this queſtion, and the reſult is, that we all think, that where an annuity is redeemable, the terms and conditions of redemption ought to be ſet forth in the memorial, in order that the party who is to have the benefit of ſuch redemption, may without being driven to any compulſory means, be apprized of thoſe terms and conditions, and may redeem it with moſt eaſe and convenience to himſelf. The conſequence is that we muſt make

The rule abſolute (*c*).

(*c*) When this matter was firſt moved, *Williams* Serjt. ſtated that no action had been brought on the bond, nor any judgment entered up on the warrant of attorney, but cited *Ex parte Cheſter*, 4 *T. R.* 694. to ſhew that the Court had nevertheleſs a juriſdiction. The Court ſaid "that every warrant of attorney *entered* was ſubject to their cognizance, but that they could not in all caſes order all the proceedings to be cancelled, becauſe they were void by the 1ſt ſection of the act." So in Duke of *Bolton* v. *Williams*, 4 *Brown Chan. Caſ.* 310. and 2 *Vez.* jun. 154. Lord *Loughborough* ſaid, "The courts of common-law, which will upon their general juriſdiction enter into the validity of the warrant of attorney or judgment upon motion, in the particular application under the act, will only ſet aſide the judgment or execution, or vacate the warrant of attorney; but the juriſdiction does not extend to ordering the bond to be delivered up, and if ever done, it has been done inadvertently." *Qu.* therefore, Whether the rule in the preſent caſe was not made abſolute in the form in which it was moved through *inadvertence?*

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JOHN SCOTT *v.* GODWIN.

The reverſion of lands demiſed to the Defendant for years, is conveyed to *A.* and *B.* and the heirs of *B.* in truſt for *A.* and his heirs: *A.* declares ſingly on a covenant contained in the leaſe, and after ſetting out the above title, without averring the death of *B.*, ſtates himſelf to be "thereby ſeiſed "of the reverſion in "his demeſne as "of fee." This is bad upon demurrer.

THIS was an action on a covenant contained in a leaſe, by which the Defendant had agreed to repair certain premiſes, of which he was tenant, at his own coſts and charges.

The declaration ſtated in ſubſtance as follows:—That one *Thomas Grice* was ſeiſed of the reverſion of the premiſes in queſtion in his demeſne as of fee, ſubject to a mortgage term of 500 years, which term was ſubject to be defeated, and was defeated before the making of the indenture thereinafter next mentioned; that by an indenture made between the ſaid *Thomas Grice* and the Defendant, the ſaid *Thomas Grice* demiſed the premiſes in queſtion to the Defendant for a term of twenty-one years; that the Defendant covenanted to repair at his own coſts and charges; that the Defendant entered, and became poſſeſſed, and that the ſaid *Thomas Grice* was ſeiſed of the reverſion in his demeſne as of fee; that being ſo ſeiſed, the ſaid *Thomas Grice* deviſed the ſaid reverſion to his ſon and died: that the ſon together with certain perſons having mortgage claims upon the premiſes by leaſe and releaſe conveyed the ſaid reverſion to *John Scott*, and *Robert Scott*, "to have and "to hold the ſame unto the ſaid *John Scott* and *Robert Scott*, to "the only proper uſe and behoof of the ſaid *John Scott* and "*Robert Scott*, and the heirs and aſſigns of the ſaid *Robert Scott* "for ever, but nevertheleſs as to the eſtate and intereſt of the "ſaid *Robert Scott*, his heirs and aſſigns therein, in truſt for the "ſaid *John Scott*, his heirs and aſſigns for ever. *By means of* "*which ſaid premiſes, the ſaid* John Scott *became, and was, and* "*ſtill is ſeiſed of and in the ſaid reverſion in his demeſne as of fee*," &c. That although *John Scott* had ever ſince the ſaid reverſion came to him by aſſignment as aforeſaid, kept the covenants on his part, yet the Defendant had broken his covenant by delivering up the premiſes out of repair. Damages, *&c.*

To this there was a ſpecial demurrer, aſſigning ſeveral cauſes (which were afterwards abandoned) and joinder therein.

Shepherd Serjt. for the Defendant. I ſhall not argue the ſpecial cauſes of demurrer, but rely on a ſubſtantial defect on the record. The declaration is here in the name of one, whereas the legal eſtate in reverſion of the lands in queſtion belonged to *John Scott* and *Robert Scott*, as joint tenants for their lives; and thoſe in whom the legal eſtate in reverſion is muſt bring the action. Now *John* and *Robert Scott* may be jointenants for their lives, although

Robert had a ſeveral inheritance. *Co. Litt.* 182. *a.* 2 *Black. Comm.* 181. It is true that the intereſt of *Robert Scott* and his heirs was in truſt for *John Scott*; but that can make no difference in the legal eſtate, and *John Scott*'s eſtate in ſeveralty was merely equitable. It is ſaid, *Co. Litt.* 180. *b.* "that jointenants muſt "jointly implead, and jointly be impleaded by others." Suppoſing them however to be tenants in common, ſtill they muſt join in this action. *Co. Litt.* 197. *b.* There is a diſtinction between actions for realty and actions for perſonalty; in the former, the parties may ſever, becauſe each may recover his ſhare; but in the latter, not. Here the covenant is for not repairing, in which caſe damages are to be given; and how ſhall each have his damages apportioned? But there can be no doubt of *John* and *Robert Scott* being jointenants, who were ſo made in order to bar *John Scott*'s wife of dower. Beſides *John Scott*, as aſſignee of the reverſion, muſt bring his action of covenant under 32 *H.* 8. *c.* 34. and thereby ſtands in the ſame ſituation as the leſſor.

The covenant therefore muſt be conſidered as being made to both *John* and *Robert*, which renders it impoſſible for *John* to bring this action alone.

Marſhall Serjt. for the Plaintiff. Firſt, I ſhall contend that *Robert Scott* is a mere truſtee, introduced into the conveyance to preclude *John Scott*'s wife from having her dower, and ſolely for the benefit of *John Scott* the *ceſtuy que truſt*; and it is now a ſettled rule of law that an eſtate in truſt merely for the benefit of the *ceſtuy que truſt*, ſhall not be ſet up againſt him. This was laid down by Lord *Manſfield*, in *Lade* v. *Holford*, 3 *Burr.* 1416. 2 *Bl.* 428. *B. N. P.* 110. and *Goodtitle* v. *Knot*, *Cowp.* 46. and recognized by Lord *Kenyon*, in *Doe* v. *Staples*, 2 *T. R.* 696. Now the difference between the caſe in *Cowper* and the preſent is, that the former was the caſe of a *ceſtuy que truſt* with a mere equitable title; this is the caſe of a *ceſtuy que truſt* having the *whole intereſt* in himſelf, and alſo being jointenant of the legal eſtate. Secondly, Suppoſing *Robert Scott* to have been a jointenant with an intereſt in the demiſed premiſes, and admitting, that regularly jointenants ſhould join in perſonal actions affecting their joint intereſt, yet the Defendant can only take advantage of this irregularity by plea in abatement. *Com. Dig. Abatement*, E. 8. which cites *Bracton*, *l.* 5. *De Exceptionibus*, *c.* 25. "*Competit etiam exceptio dilatoria tam ex perſonâ* "*alterius quàm petentis; quia ſine alio, agere non potuit per ſe, qui* "*tantundem juris habet quam ipſe qui petit; ut ſunt plures participes*," &c. and then inſtances huſband and wife, jointenants, *&c.*

So alſo *Fleta, l.* 6. *c.* 38. *ſ.* 3. "*Competit etiam tenenti exceptio* "*dilatoria contrà petentem, cum ſolus petat, quod cum alio petere* "*deberet; ſicut unus vel una cohæredum vel vir ſive uxor, de re* "*uxoriâ;*" and *Skin.* 12. *Anon.* This ſhews that it *may* be taken advantage of by plea in abatement; to ſhew that it muſt, *vid. Com. Dig. Abatement*, E. 12. "If one jointenant or joint-"merchant ſue alone, and it is not pleaded in abatement, no ad-"vantage ſhall be taken of it in evidence." And ſo it was held in trover, *Skinn.* 640. *Dockwray* v. *Dickinſon*; in treſpaſs, *Deering* v. *Moor, Cro. Eliz.* 554.; in trover for injuries done to the inheritance, *Brown* v. *Hodges*, 1 *Salk.* 290. *Blackburn* v. *Grove* cited *Carth.* 63.; in trover by the aſſignees of a bankrupt, *Nelthorpe* v. *Dorrington*, 2 *Lev.* 113.; in an action on a ſtatute, by one of ſeveral joint-owners of a ſhip, *Sands* v. *Child*, 1 *Salk.* 31. 3 *Lev.* 35. *Skin.* 361.; in treſpaſs for ſeizing the Plaintiff's goods, *L'Egliſe* v. *Champanti*, 2 *Str.* 820.; and in debt on bond againſt one of ſeveral joint obligors, *Whelpdale*'s caſe, 5 *Co.* 119. *Cabell* v. *Vaughan*, 1 *Vent.* 34. 1 *Sid*, 420. S. C. 238. S. P. It appears that if the Defendant in ſuch caſes do not plead in abatement, but plead in chief, 3 *Bac. Abr.* 218. *tit. Jointenants*, either the general iſſue, 1 *Mod.* 102. *per Hale* Ch. J., or even the fact in bar, *Hollingworth* v. *Aſcue, Cro. Eliz.* 355. 461. 494. 544. or demurs, 1 *Vent.* 34. 1 *Sid.* 420. or even where the fact appears by the finding of the Jury, *Cro. Eliz.* 554. 5 *Co.* 119. *Harman* v. *Whitchlow, Latch.* 152. Sir *William Jones* 142. the Plaintiff muſt have judgment. If it appear in the declaration that there are other jointenants who do not join in the action, yet if it do not appear alſo that they are alive, the Defendant muſt plead in abatement. *Benyon* v. *Palmer*, 5 *Mod.* 73. 1 *Salk.* 31. *Cro. Eliz.* 544. 6 *T. R.* 766. So here it ſhould have been averred that *Robert Scott* was alive, and pleaded in abatement; for nothing will be intended by the Court in favour of this objection. The only caſe in which it has been held that this objection may be taken on the general iſſue, is *L'Egliſe* v. *Champanti*, and there the dictum of Lord *Raymond* is confined to aſſumpſit, which ſeems to be an innovation. Perhaps the Plaintiff here did not know whether *Robert Scott* was living or dead, and this a plea in abatement would have ſhewn.

Shepherd in reply. I ſhall paſs by many of the caſes cited, becauſe they do not apply, and ſhall not agitate the queſtion how far it is neceſſary to plead this matter in abatement on contracts in general. I contend that every perſon who brings covenant as

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aſſignee of a reverſion, muſt ſtate how the reverſion comes to him; and therefore, as the Court on this record cannot ſee that the Plaintiff is aſſignee of the reverſion, he is not intitled to their judgment. Suppoſe a covenant made by the Defendant with *John* and *Robert Scott* jointly, and an action brought by *John Scott* alone, the Defendant need not plead in abatement, becauſe the objection would appear on the record, which differs from the caſe of jointenants in other contracts and in treſpaſs. The caſe of *Eccleſton* and Wife, Executors, &c. againſt *Clipſham*, 1 *Saund.* 153. is ſtrong, to ſhew that one jointenant cannot ſue alone on the covenant. If one joint-covenantee cannot bring an action alone, neither can one joint-aſſignee of a reverſion; for the action not being founded on privity of contract, the Plaintiff muſt ſo ſtate his title, as to ſhew that he may ſue under the ſtatute of *Hen.* 8. in reſpect of his eſtate. The Plaintiff ſhould not have ſtated that *Thomas Grice* deviſed, &c. whereby he became ſeiſed of the reverſion, for *John Scott* did not become ſeiſed, but *John* and *Robert Scott* jointly: he ſhould have ſtated that *Robert Scott* was dead, whereby he became ſeiſed. The caſes of joint-obligors are diſtinguiſhable from this, for there the objection does not appear on the record, and it is ſtill the deed of the Defendant. As to what has been ſaid, that the eſtate of a truſtee ſhall not be ſet up againſt the *ceſtuy que truſt*, that rule will not hold in covenant, though it does in ejectment: if the Court could take notice of a *ceſtuy que truſt* in covenant, they might as well in every action on a bond aſſigned allow the aſſignee to ſue in his own name, inſtead of that of the aſſignor.

Cur. adv. vult.

The opinion of the Court was this day delivered by *Eyre* Ch. J. The queſtion on this demurrer (which is now to be conſidered in the nature of a general demurrer, the ſpecial cauſes having been abandoned) is, whether the Plaintiff has ſhewn in his declaration a title to ſue as aſſignee of the reverſion. That title is to be collected from the operation of law on the deeds which are therein ſtated. And I take it to be moſt clear, that the operation of law upon thoſe deeds is to conſtitute *John* and *Robert Scott* joint-aſſignees. The effect of this is, that the Defendant's covenants became alſo by operation of law contracts with *John* and *Robert Scott* jointly; and that all cauſes of action to them, ariſing out of theſe contracts, muſt follow the nature of the contracts, and muſt ariſe to *John* and *Robert Scott* jointly. In fact *John Scott* has declared on a covenant made with *John* and *Robert Scott*, but has ſuppoſed himſelf capable of ſuſtaining an action alone for the breach of it. Now that this is fundamentally wrong there can be no doubt; and the principle on which it is wrong was not denied in the argument: it is only the application of the principle to this particular caſe as it ſtands on the record, that is diſputed. It has been argued, *firſt*, That *Robert Scott* appearing to be a truſtee for *John Scott*, his title cannot be ſet up againſt the *ceſtuy que truſt*; and *ſecondly*, That if it can, it muſt be by plea in abatement, and by that mode only. On the firſt of theſe points we have had no difficulty. It appearing by the Plaintiff's own ſhewing, that *Robert Scott* was made joint-aſſignee with *John Scott* (to which if it were neceſſary might be added) for purpoſes which require that the legal eſtate ſhould remain in *Robert Scott*, we cannot by any preſumption, or by any rule of law, take the legal eſtate out of him during his life-time. It is not that the Defendant ſets up the legal eſtate of the truſtee againſt the *ceſtuy que truſt*; but the *ceſtuy que truſt* himſelf has ſet it up as part of his own title. On the ſecond point we have pauſed: not in reſpect of any difficulty in deciding againſt the point as it was ſtated; but on a queſtion which the reaſoning in ſome of the numerous caſes which were alluded to by my brother *Marſhall* ſuggeſted; and which is this, whether on a general demurrer to a declaration of this kind, it can be intended in ſupport of the declaration that the jointenant, not a party to the action, is dead: in which event the whole legal eſtate would unite in *John Scott*, and he alone might ſue. In the great bulk of the caſes where it has been holden, that if there are not proper parties to a record, advantage muſt be taken of it by a plea in abatement, the objection has been, that other perſons ought to be made *Co-defendants* with the Defendant on record: and there is an eſſential difference between theſe caſes and caſes where the objection is, that there are not the proper parties *Plaintiffs* in the ſuit. Many Plaintiffs can have but one right, having but one intereſt and one cauſe of action; which ought to be, and is indiviſible, admitting of but one ſatiſfaction. But if in the nature of the thing, if on principles of law or authorities, it could be that a man ſhould derive a ſeveral intereſt out of a joint obligation to himſelf and others, and that Plaintiffs could ſue ſeparately for their portions of one right, it is moſt obvious that it muſt vex and haraſs Defendants extremely. That this cannot be appears from *Slingsbie*'s caſe, 5 *Co.* 18., and from the principle of thoſe paſſages cited from *Co. Litt.* which ſhew that jointenants muſt plead and be impleaded jointly. Whereas in

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the caſe of Defendants, in reſpect of the ſatisfaction they are to make to the Plaintiff, it is exactly the ſame thing whether they are ſued ſingly, or with others, for every individual Co-defendant is ultimately liable to the whole demand, and execution may be had againſt any one. In *Rice* v. *Shute*, 5 *Burr.* 2613. Lord *Mansfield* ſays: "Every partner is liable to pay the whole; in what pro-"portion the others ſhould contribute is a matter merely amongſt "themſelves." There is therefore more of form than of ſubſtance in the objection that others ſhould be made Co-defendants: however, the writ ſhall abate that has not made all the parties Co-defendants, becauſe the Plaintiff may have a better writ in the ſame cauſe; but the action ſhall not be barred, becauſe the Plaintiff has in himſelf an abſolute right to ſue the Defendant. The Defendant can only inſiſt, if he pleaſes, that the Plaintiff ſhall ſue others with him; and this advantage he may waive, where the objection does not appear on the face of the record, and does waive in that caſe, unleſs he plead in abatement. Hence it is, that where one of ſeveral joint obligors is ſued, and *non eſt factum* is pleaded, the better opinion is that a Defendant ſhall not be allowed to object that there are other co-obligors, for the deed is his (*a*), though it is alſo the deed of others. It is convenient that the obligors ſhould all be ſued together, and therefore the Defendant may plead in abatement; but it is not abſolutely neceſſary, and therefore he cannot plead in bar; nor can he take advantage of the objection on the plea of *non eſt factum* after oyer. I do not mean to enter into the queſtion, whether if the Plaintiff ſtate in his own declaration that the bond was made by two, the Defendant cannot take advantage of it: but where the declaration is right upon the face of it, if there be no plea in abatement, the Defendant cannot take advantage of it afterwards. I admit that it has been eſtabliſhed by many caſes, that in aſſumpſit againſt one Defendant and non-aſſumpſit pleaded, evidence of a contract with more than one does not maintain the iſſue, on the ground that it does not follow the contract in the declaration; but I take the contrary to be now fully ſettled upon the grounds which I have ſtated, and upon very old authorities which are taken notice of in the caſe of *Rice* v. *Shute*, and apply with equal force in aſſumpſit as in other caſes. In that caſe, which is the laſt on this ſubject, Lord *Mansfield* lays great ſtreſs on the difficulty under which Plaintiffs lie when they are to

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(*a*) *Whelpdale's* caſe, 5 *Co.* 119.

ſue partners. They know, ſays he, whom they deal with, but they do not know who are the ſecret partners; a Plaintiff may be nonſuited twenty times before he finds them all out, or may be driven to file a bill for a diſcovery; and therefore he argues that convenience and the ends of juſtice required that if a Defendant would object that others are concerned with him in the tranſaction, he ſhould plead in abatement, and ſo tell the Plaintiff whom he was to ſue. Certainly this reaſoning has its weight as to co-partners, being made Co-defendants, but as to Plaintiffs it does not apply; they are under no difficulty of this kind; every Plaintiff knows who is concerned in intereſt with him; he cannot have a better writ given him by a plea in abatement than he might have had without it. In this, and in other reſpects, as I have already obſerved, the caſe of Plaintiffs and Defendants eſſentially differs (*a*); and I conceive the rule of law reſpecting them is, generally ſpeaking, (with perhaps one (*b*) exception,) different. I take it to have been ſolemnly adjudged in ſeveral (*c*) caſes, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot ſue alone. In the laſt caſe it is common experience, that where a joint contract appears in evidence on the general iſſue, the Plaintiff is nonſuited; and there are many caſes in the books, in which it has been held to be error for one co-obligee or one co-covenantee to ſue alone. The conſequence is, that the objection that it is neceſſary to plead this matter in abatement is ill-founded. But where it appears on the record that the Plaintiff has a better writ according to his own ſtatement, why ſhould the Defendant plead in abatement? the object of a plea in abatement is to introduce on the record ſome new fact, which can only be done in that manner; but where the fact appears in the declaration itſelf, what remains for the Defendant but to aſk the judgment of the Court? It may be anſwered that the Defendant ought to plead the variance between the writ and the declaration; but there are caſes which eſtabliſh that it may be taken advantage of in error, which could never be, if it were pleadable in abatement of the writ. The firſt of the caſes cited for the Plaintiff, which I turned to, was that of *Cabell* v. *Vaughan*, 1 *Vent.* 34.; as it is ſhort I will ſtate the words: "In an action of debt upon a bond againſt "one, and it appears another was jointly bound with him, where-

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(*a*) In *Barnard* v. *Kenworthy*, *B. R. H.* 24 *G.* 3. which was aſſumpſit on a note, Lord *Mansfield* ſaid: "If there are leſs "Plaintiffs than there ought to be, it goes "to a nonſuit; if leſs Defendants, it is only "in abatement."

(*b*) See *Addiſon* v. *Overend*, 6 *T. R.* 766.

(*c*) *Vernon* v. *Jefferys*, *Str.* 1146. *Graham* v. *Robertſon*, 2 *T. R.* 282.

"upon the Defendant demurs; but it was adjudged for the Plaintiff, for the Defendant cannot demur in ſuch caſe, unleſs the other obligor be averred to be living, and alſo that he ſealed and delivered the bond. 3 *Cro.* 494. 544. *Aſcue* and *Hollingworth*'s caſe, 28 *H.* 6. 3. And if one be bound to two, one obligee cannot ſue, unleſs he avers that the other is dead. In *B. R.* 1651. 1068. *Levit* v. *Staineforth*." No notice was taken at the bar of this latter paragraph; it is certainly too material to be paſſed over in a review of the caſes on this ſubject. As if for the very purpoſe of preventing the firſt part of the caſe from being miſunderſtood, it adds, that in the caſe of one of ſeveral co-obligees ſuing alone, a different rule prevails from that which takes place where one of ſeveral co-obligors is ſued. And the rule is that which goes the whole length of deciding upon the only doubt which could be made in this caſe; whether on a general demurrer it could be intended that a co-covenantee was dead, in order to ſuſtain the declaration. "If one be bound to two, one obligee cannot ſue, unleſs he *avers* the other is dead." He muſt recover upon his own ſtrength; he muſt ſhew that which is neceſſary to make out his title; having by his own ſhewing given the legal eſtate to himſelf and another, he muſt take upon himſelf the burthen of deveſting that legal eſtate in the other, and veſting it in himſelf; he muſt *aver that he is dead.* The caſe of *Cabell* v. *Vaughan* is alſo reported in 1 *Sid.* 421. by the name of *Chappel* v. *Vaughan;* and in the ſame book 238. *Oſborn* v. *Cuſborn*, it is ſtated to have been laid down as a rule concerning the bringing debt on obligations, that if an obligation is made to three and two bring the action, they ought to ſhew that the third is dead. Theſe caſes admit of this anſwer, that though they ſtate a rule, they do not ſtate in what manner advantage is to be taken of it, which it may be ſaid ought to be by plea in abatement. But the caſe of *Eccleſton* and others executors of *Caſtle* v. *Clipſham*, 1 *Saund.* 153. and *Slingsbie*'s caſe, 5 *Co.* 18. *b.* are deciſive on this head. In the firſt the objection was allowed in arreſt of judgment, and the party driven to diſcontinue; in the laſt the objection was on error in the *Exchequer-Chamber*, and for that error the judgment was reverſed. Now theſe caſes were both in covenant, and ſo directly in point. Sir *Joſiah Child*'s caſe, 1 *Salk.* 31. which comes neareſt to an authority for the Plaintiff, ſuppoſing the rule as laid down in *Salkeld* to be correctly ſtated, and to have been well conſidered, (which the report of the ſame caſe, by *Levinz*, who argued it for the Plaintiff, leads me to doubt,) is diſtinguiſhable from the preſent caſe, on the ground of diſtinction taken by Lord *Raymond* in *L'Egliſe* v. *Champanti*, reported in *Str.* 820. that it was a caſe in tort and not contract. There it is ſaid that in aſſumpſit it might be taken advantage of at the trial, for it would not be the ſame contract, but in tort it ought to be pleaded in abatement. So of the late caſe of *Addiſon* v. *Overend*, 6 *T. R.* 766.; where it was held on great conſideration, that after a general verdict on the general iſſue it was no objection in arreſt of judgment, that in one count of the declaration it was alleged that the Plaintiff was the ſole owner of a ſhip, and in another that he was a part owner, *viz.* of a quarter of the ſhip: for that alſo was a caſe of tort and not of contract. It ſeems to have been ſuppoſed at the bar that *L'Egliſe* v. *Champanti*, *M.* 12 *G.* 2. was the firſt caſe in which ſuch a diſtinction was taken; but in *Dockwray* v. *Dickenſon*, *Skinn.* 640. it is pointedly ſaid, "That the difference is where it is an action "founded on a tort and not guilty pleaded, and where it is founded "on a contract; for there it is non-aſſumpſit, becauſe it is another "contract, but the party may make a tort joint and ſeveral." In truth, till the caſe of *Rice* v. *Shute*, *E. T.* 10 *G.* 3. *B. R.* it ſeems to have been the uſual courſe to nonſuit the Plaintiff, if on the trial in an action of aſſumpſit it appeared that the Defendant had a partner who was not ſued, as it remains now the courſe to nonſuit the Plaintiff if he has a partner not made a Co-plaintiff. I am not called upon to inquire whether the rule in tort, to which it is ſaid, 2 *Lev.* 113. *Nelthorp* v. *Dorrington*, that Sir *William Jones*, a ſound and able lawyer, accorded *hæſitanter*, be well eſtabliſhed or not. If a tort in reſpect of joint property can be joint or ſeveral, it is very well; a breach of a joint contract with two or more cannot be joint and ſeveral. This Plaintiff could not ſue alone, and therefore we are of opinion that there muſt be

Judgment for the Defendant.

SMITH *v.* O'KELLY.

July 5th.

A Defendant is not liable to be ſued in the county-court for a debt under 40*s.* not ariſing within the county, though he be *reſident* therein.

THIS was an action of aſſumpſit; the cauſe of action aroſe at *Newmarket*, but the venue was laid in *Middleſex*, and the verdict being for 8 *s.* 6 *d.* only, and there being no certificate according to the 23 *G.* 2. *c.* 33.;

Marſhall Serjt. on ſtating the above facts, and that the Defendant could prove an expreſs promiſe to pay in *Middleſex*, obtained a rule to ſhew cauſe why a ſuggeſtion ſhould not be entered on the roll, that the Defendant was reſident in *Middleſex*, and liable to be ſummoned to the county-court.

Le Blanc Serjt. ſhewed cauſe. The county-court has no juriſdiction where the cauſe of action does not ariſe within the county, and a plaint levied in that court muſt *ſtate* the cauſe of action to have ariſen within its juriſdiction, otherwiſe it is error. In *Welſh* v. *Troyte*, 2 *H. Bl.* 29. and *Tubb* v. *Woodward*, 6 *T. R.* 175. this Court and the Court of *King's Bench* refuſed to ſtay proceedings, though the cauſes of action were under 40 *s.* upon the ground, that as the Defendant did not reſide in the county in which the cauſes of action accrued, he could not be ſued in the county-court.

Marſhall in ſupport of the rule. A Defendant is liable to be ſummoned to the county-court, *if reſident* within the county, though the cauſe of action does not ariſe there. The *Statute of Glouceſter*, 6 *Ed.* 1. *c.* 8. reſtrains actions under 40 *s.* to the county-court, but does not confine its juriſdiction to the limits of the county; and the object of the *Statute of Weſtminſter* 1. 3 *Ed.* 1. *c.* 35. is to reſtrain particular juriſdictions within their proper limits, and yet it never mentions the county-court. In *Com. Dig.* tit. *County*, C. 5. *Juriſdiction of the County-Court*, there is no authority to ſhew that it is confined to cauſes ariſing within the county. If the Defendant's liability to be ſummoned to the county-court be traverſed, he will give in evidence an expreſs promiſe to pay in *Middleſex*. Beſides, this not being an application to ſtay proceedings becauſe the action is under 40 *s.* but to enter a ſuggeſtion purſuant to a particular act of parliament, the caſes cited on the other ſide do not apply.

Per Curiam. This is a ſtruggle in the teeth of a ſolemn determination in both courts, and of the principle which governs every inferior court in this country. The rule muſt therefore be diſcharged, but as the action is a very ſhabby one, let it be without coſts.

Rule diſcharged without coſts.

July 5th.

JONES *v.* KITCHIN.

The plea *de injuriâ ſuâ propriâ abſque tali cauſâ* to a cognizance for rent in arrear, is bad upon ſpecial demurrer.

REPLEVIN for goods and chattels.

Cognizance, ſtating that the place in which, *&c.* was a houſe held by the Defendant, under a demiſe from one *John Oſborne*, at a yearly rent of 42 *l.* payable on the quarterly feaſt days; that 31 *l.* of the ſaid rent was due in arrear, and unpaid to the ſaid *John Oſborne*, and that the Defendant as bailiff of the ſaid *John Oſborne* acknowledges, *&c.*

Plea in bar, *de injuriâ ſuâ propriâ abſque tali cauſâ.*

Demurrer thereto, aſſigning for cauſes, that the ſaid Plaintiff hath in and by his ſaid plea tendered and offered to put ſeveral and diſtinct matters in iſſue, that is to ſay, the holding and enjoying of the ſaid dwelling-houſe with the appurtenances in the ſaid declaration and cognizance above-mentioned, by the ſaid Plaintiff; and hath alſo in and by his ſaid plea denied that the ſaid rent in the ſaid cognizance mentioned was due, in arrear, and unpaid as in that cognizance is above alleged and contained; and for that the ſaid Plaintiff hath alſo in and by his ſaid plea tendered and offered to put in iſſue, as well the times and manner of the payment of the ſaid rent as alſo the amount and quantity of the ſame; and for that the ſaid Plaintiff ſhould and ought in and by his ſaid plea to have tendered and offered to put in iſſue one ſingle fact only, to be tried by a Jury of the country, and to have relied on the ſame; and for that in the manner the ſame plea is above pleaded, no certain or ſingle iſſue can be joined in the ſame; and for that the ſaid plea is double, multifarious, and not iſſuable, and is alſo in various other reſpects defective, argumentative, inſufficient, and informal.

Joinder in demurrer.

The Court inclining againſt the plea in bar called upon *Shepherd* Serjt. to begin in ſupport of it.

Shepherd. Where two facts are neceſſary to make up one defence, neither of which is matter of record, the plea *de injuriâ ſuâ propriâ abſque tali cauſâ* is good; and ſo is the rule in *Crogate*'s caſe, 8 *Co.* 66. *b.* 1ſt reſolution. In *Chauncey* v. *Winde*, Ld. *Raym.* 700. this diſtinction from 2 *Leon.* 102. was taken in argument, that where the matter of record is but inducement to the action, a ſpecial anſwer is not requiſite; and *Holt* Ch. J. thought the replication *de injuriâ* to a juſtification of treſpaſs, under a warrant from the commiſſioners, by virtue of an act of Parliament, good. In *Robinſon* v. *Rayley*, *Burr.* 320. Lord *Manſfield* ſays, "It is "true you muſt take iſſue on a ſingle point, but it is not neceſ- "ſary that the ſingle point ſhould conſiſt only of a ſingle fact." So here tenancy in the Plaintiff and rent in arrear are both neceſſary to intitle the Defendant to diſtrain. Though at common law the Defendant muſt have ſet forth his title, which would have

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precluded the plea *de injuriâ*, yet by the 11 *G.* 2. *c.* 19. *ſ.* 22. matter of title is excluded from the avowry, and nothing is to be ſet out but matters of fact, which in this caſe are tenancy and rent in arrear. If therefore this be not a good plea, the Plaintiff muſt either admit the Defendant's title to the land or the rent in arrear. The intention of the ſtatute was only to ſhorten the pleadings, and the Defendant need not have ſtated by whom the demiſe was made, but the Defendant's having gone beyond the ſtatute, makes no difference in the law. In a Precedent Book of Mr. J. *Lawrence*, there is ſuch a plea as the preſent, and a note of his in the margin, ſtating that he demurred to it; but it was overruled. The Plaintiff might have traverſed every fact in the avowry by leave of the Court, which leave is now become almoſt matter of right: the Court therefore will not oblige him to do that in a circuitous manner, which may be done more ſhortly by the preſent plea.

Marſhall Serjt. *contrà*. If this mode of pleading be good, the 11 *G.* 2. inſtead of conferring a favour on landlords, would produce an inconvenience: it would be better to avow as at common law, and have an explicit anſwer to one fact. This plea would put in iſſue, firſt, the holding, which if there be no privity of contract may involve the diſtrainor's title; ſecondly, the terms of the holding, *viz.* the amount and days of payment of rent; thirdly, that rent was in arrear; fourthly, that the diſtreſs was taken for that rent; and in the caſe of a cognizance, like the preſent, command. The 4th reſolution in *Crogate*'s caſe is decidedly againſt the preſent plea in bar; I admit that if the ſeveral matters put in iſſue make together but one defence, they may all be put in iſſue together, and then *de injuriâ ſuâ propriâ abſque tali cauſâ* is proper. But when the Plaintiff makes title by his declaration to any thing, and the Defendant pleads ſomething in deſtruction thereof or of the Plaintiff's cauſe of action, then the Plaintiff muſt reply ſpecially, and not ſay *abſque tali cauſâ*, for *abſque tali cauſâ* goes to the whole plea. *Yelv.* 157. *Taylor* v. *Markham*, *Cro. Jac.* 224. S. C. 1 *Brownlow* 215. S. C. *Horn* v. *Lewin*, *Fort.* 233. *Salk.* 583. *Witnel* v. *Cook*, *Cro. Eliz.* 812. *Banks* v. *Parker*, *Hob.* 76. *White* v. *Stubbs*, 3 *Lev.* 307. 2 *Saund.* 294. S. C. In *Cockerill* v. *Armſtrong*, the declaration was treſpaſs for taking a gelding: Defendant juſtified as ſervant of *J. S.* who was ſeiſed in fee: replication, *de injuriâ ſuâ propriâ abſque tali cauſâ*, and judgment for the Defendant. The caſe is ſhortly reported in *Com.* 582., but I will read to the Court the judgment of Lord Ch. J. *Willes*, as taken from his Lordſhip's note (*a*). It only remains to obſerve on the caſes cited for the Plaintiff. That which was called a ſingle point in *Robinſon* v. *Rayley*, embraced ſeveral diſtinct facts, any one of which being negatived, would have intitled the Plaintiff to judgment; therefore the doctrine laid down there is directly contrary to the doctrine in *Crogate*'s caſe, which, before that, was conſidered as the great land-mark. In *Chauncey* v. *Winde*, the Court held the replication good, becauſe the ſtatute being a general one needed not to have been pleaded, and therefore could make no part of the iſſue: and in that caſe, as it is reported in 12 *Mod.* 580. Mr. *Eyres*, in arguing for the Defendant, admitted that where one claims common by preſcription, rent by grant, goods by ſale, &c. and ſo juſtifies as having an intereſt therein, there the Plaintiff muſt anſwer directly to the title, and not *de injuriâ ſuâ propriâ*.

The Court underſtanding that ſuch a plea in bar as the preſent had been uſed of late, took time to conſider.

The opinion of the Court was this day delivered by

EYRE Ch. J. As a wiſh has been expreſſed by the Defendant's counſel, that this caſe ſhould be diſpoſed of within the term, we will not keep it on foot any longer, for the ſake of giving a more formal judgment than is already prepared. It is only neceſſary to read *Crogate*'s caſe, to be perfectly ſatisfied, that on the authorities and on the reaſon of the thing this plea in bar is bad. The ſecond reſolution in that caſe is, "That when the Defendant "in his own right, or as ſervant to any other, claimeth an intereſt "in the land, or to any common, or rent going out of the land, "or to any way or paſſage upon the land, &c. there *de injuriâ ſuâ* "*propriâ* generally is no plea. That if the Defendant juſtifieth as "ſervant, there *de injuriâ ſuâ propriâ* in ſome of the ſaid caſes, "with traverſe of the commandment, the ſame being made ma-"terial, is good, &c. For the general plea *de injuriâ ſuâ propriâ* "(which ſhould be replication) is properly when the Defendant's "plea doth conſiſt mere upon excuſe, and upon no matter of

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(*a*) By that note it appeared that the deciſion of the Court of *C. B.* pronounced by Lord Ch. J. *Willes*, was founded on the ſecond and fourth reſolutions in *Crogate*'s caſe. His Lordſhip ſaid, they did not rely on *Cro. Jac.* 599. becauſe *abſque tali causâ* was there omitted; nor on *Cooper* v. *Mouke*, *C. B.* T. 1737. becauſe that was an action for breaking and entering a houſe; but on what was ſaid in *Taylor* v. *Markham*, *Cro. Jac.* 224. *Yelv.* 157. S. C. and on the caſe 14 *Hen.* 4. 32. *b.* there cited, and *Cro Eliz.* 812. He ſaid the Archbiſhop of *Canterbury* v. *Kemp*, *Cro. Eliz.* 539. was contradicted by *Crogate*'s caſe.

1797. Jones v. Kitchin.

" intereſt whatſoever. And it is ſaid *de injuriâ ſuâ propriâ*, becauſe " the injury properly in this ſenſe is to the perſon or to the fame: " as battery, or impriſonment to the perſon, or ſcandal to the " fame. There if the Defendant excuſe himſelf upon his own " aſſault, or upon hue and cry, there properly *de injuriâ ſuâ propriâ* generally is a good plea, for there the Defendant's plea doth " conſiſt only upon matter of excuſe." The third reſolution is, " That when by the Defendant's plea any authority or power " is mediately or immediately derived from the Plaintiff, there, " although no intereſt be claimed, the Plaintiff ought to anſwer " it, and ſhall not reply generally *de injuriâ ſuâ propriâ*." Thus in this caſe, the rule is diſtinctly laid down, that the replication *de injuriâ ſuâ propriâ* is only to be received, where the defence ſet up is matter of excuſe, and not where it aſſerts any right or intereſt. Nor is that all; for if the defence turns on the plea of commandment, *de injuriâ ſuâ propriâ* is not good, but the commandment muſt be anſwered. In the caſe of *Cockerill* v. *Armſtrong*, *Bull. N. P. p.* 93. *ed.* 1790. which was treſpaſs for taking a gelding, and the Defendant pleaded, that the place where, *&c.* was 100 acres, *&c.* that *J. S.* was ſeiſed in fee, and that he as his ſervant and by his expreſs orders took the gelding damage feaſant, it was held that the Plaintiff could not reply *de injuriâ ſuâ propriâ abſque tali cauſâ*, for that would put in iſſue three or four things; but he muſt traverſe one thing in particular. This caſe is right in point of authority; and I agree with the rule laid down, that where the excuſe ariſes in part out of the ſeiſin in fee of another, there *de injuriâ ſua propriâ* is not to be received. But the reaſon is not, becauſe it puts two or three things in iſſue; for that may happen in every caſe where the defence ariſes out of ſeveral facts, all operating to one point of excuſe: the reaſon is becauſe this plea is only allowed where an excuſe is offered for perſonal injuries, and not even then, if it relates to any intereſt in land (and here an intereſt in land would make part of the iſſue) or to any commandment. It is right that this caſe ſhould be brought within the general rules of pleading, otherwiſe the 11 *G.* 2. which was intended to operate for the eaſe and benefit of landlords, would be turned againſt them: for before the making of that ſtatute, the iſſue in replevin muſt have been confined to ſome one material point. If we were now to break in upon the rule ſo ſatisfactorily laid down in *Crogate*'s caſe, we ſhould confound all the rules of pleading. If we admit this plea in the

preſent

preſent caſe, I do not ſee why we muſt not let it in, in *quare impedit*, and every other caſe. Let us ſtand by the rules of pleading, which if we infringe here, we may deſtroy altogether. We are all of opinion that this plea in bar is bad.

Judgment for the Defendant.

CAZALET *v.* DUBOIS.

July 5th.

It is in the diſcretion of the Court, to put a Defendant under terms, who moves to have the iſſues levied under ſeveral diſtringas's reſtored to him on his appearance, according to 10 *G.* 3. *c.* 50. *ſ.* 4.

A RULE having been obtained to ſhew cauſe why the iſſues levied under ſeveral diſtringas's ſhould not be reſtored on the Defendant's appearance,

Le Blanc Serjt. inſiſted that the Defendant ſhould be put under certain terms.

Heywood Serjt. *contrà* relied on the words of the 10 *G.* 3. *c.* 50. *ſ.* 4. by which it is provided "that when the purpoſe of the writ "is anſwered, that then the iſſues ſhall be returned; or if ſold, "what ſhall remain of the money ariſing by ſuch ſale, ſhall be "repaid to the party diſtrained upon."

Per Curiam. When a party ſtands out ſeveral diſtringas's, it is perfectly in the diſcretion of the Court, whether they ſhall order the iſſues to be returned; and as the Court has diſcretion as to returning the iſſues *at all*, they muſt have a right to impoſe terms. The words of the ſtatute muſt be underſtood with a reference to the conſtant juriſdiction of the Court. This is a convenient rule, and may perhaps put an end to the practice of ſtanding out diſtringas's.

Rule abſolute, on payment of coſts, the Defendant undertaking to plead *inſtanter*, and take ſhort notice of trial.

BADLEY *v.* LOVEDAY.

July 5th.

The Court will not grant an attachment for non-performance of an award, pending an action brought on the award: nor allow the Plaintiff to waive the action, in order to apply for the attachment.

COCKELL Serjt. having obtained a rule to ſhew cauſe why an attachment ſhould not iſſue againſt the Defendant, for non-performance of an award, though an action on the award was pending in the Court of *King's Bench*, he was now called upon to ſupport his rule.

Cockell. By 1 *Salk.* 73. it appears that a party may proceed both by action, and attachment on an award at the ſame time. Notwithſtanding *Stock* and *Huggens* v. *Smith*, *Caſes temp. Hard.* 106, 107. in a ſubſequent caſe, *Andrews* 299. a rule was granted for an attachment on the Plaintiff's undertaking to diſcontinue the action. The Plaintiff in this caſe is ready to waive the action, being too poor to proceed in it.

Sed per Curiam. We ſhall not allow him to waive the action, to enable him to make this application. He has made his election.

Rule diſcharged without coſts.

Lingham *v.* Biggs and Another.

If the furniture of a coffee-houſe be taken in execution by a creditor, and without ever being removed, be let by him to the keeper of the coffee-houſe, who becomes bankrupt while in poſſeſſion of it; the aſſignees may ſeize it under the 21 *Jac.* 1. *c.* 19. *ſ.* 11.

Trover againſt the Defendants, who were the aſſignees of *Anne Munday* a bankrupt, for all the houſehold furniture, and other articles belonging to a coffee-houſe.

This cauſe was tried before *Eyre* Ch. J. at *Guildhall*, Sittings after laſt *Eaſter* term.

Anne Munday, the bankrupt, was the widow of a perſon who had kept a coffee-houſe, and being indebted to the Plaintiff, gave him a warrant of attorney for 800 *l.*, under which he entered up judgment, and took in execution the goods in queſtion. They were valued by the ſheriff at 337 *l.* 13 *s.* 6 *d.* and thereupon a bill of ſale was made out by the ſheriff at that price, to *Thomas Lingham* the Plaintiff's brother, in truſt for the Plaintiff. In *June* 1791, articles of agreement under ſeal were entered into between the ſaid *T. Lingham*, the Plaintiff, and *Anne Munday*; by which the Plaintiff let the goods to *Anne Munday* at the yearly rent of 27 *l.*, for four years, and ſhe covenanted not to remove them from the coffee-houſe without the Plaintiff's conſent. The deed contained a proviſo, that the Plaintiff ſhould enter and take poſſeſſion on failure in the payment of rent. *Anne Munday* continued in poſſeſſion of the goods beyond the four years, and until they were ſeized under the commiſſion.

At the trial an objection being taken to the Plaintiff's recovery on the 21 *Jac.* 1. *c.* 19. *ſ.* 11. the Chief Juſtice doubted whether this caſe were within it, and a verdict was given for the Defendant, with liberty to enter a verdict for the Plaintiff, damages 337 *l.* 13 *s.* 6 *d.* if the Court ſhould be of opinion that it was.

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Adair Serjt. having accordingly obtained a rule to ſhew cauſe why the verdict ſhould not be entered for the Plaintiff,

Cockell Serjt. ſhewed cauſe. The 21 *Jac.* being a conſiderable extenſion of the bankrupt laws, in favour of creditors, ought to receive a liberal conſtruction. It differs from the 13 *Eliz.* which only provided againſt fraudulent conveyances: but this ſtatute attaches on all goods left in the hands of a bankrupt, even without fraud, if the bankrupt has thereby obtained a falſe credit with the world. It was determined in *Stevens* v. *Sole*, cited 1 *Atk.* 170. *Cooke's Bankrupt Laws* 229. that an oſtenſible poſſeſſion of chattels by the bankrupt was ſufficient to intitle the aſſignee under the 21 *Jac.* Now here Mrs. *Munday* had as full and oſtenſible a poſſeſſion as poſſible: ſhe had the uſe of the articles in queſtion, and they were of a periſhable nature. Poſſeſſion of moveables imports property; and on that ground, a diſtinction is taken between a mortgage of realty and a mortgage of chattels: in the latter caſe the ſuppoſition of ownerſhip can only be repelled by notice. In *Ryall* v. *Rolle*, 1 *Atk.* 165. Lord *Hardwicke* decided on the ſpirit, not on the words of the act, and thought that the 11th ſection ought to be governed by the preamble at the end of the 10th ſection. This caſe cannot be compared to that of a banker or a factor, becauſe they are known to deal upon commiſſion; nor to that of furniture in lodgings, which is known not to belong to the perſon in poſſeſſion; therefore the world is not deceived. The caſe of *Bryſon* v. *Wylie* (*a*), *Cooke's Bankrupt Laws* 234. is exactly like the

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(*a*) The Reporters have been favoured with the following note of the caſe of *Bryſon* v. *Wylie*, which is ſomething fuller than any already in print.

Bryson *v.* Wylie, *H.* 24 *Geo.* 3. *B. R.*—

Trover for a Dier's Plant.

The cauſe was tried at the ſittings after *Michaelmas* Term 1783, at *Guildhall*, before Lord *Mansfield*, when a verdict was found for the Plaintiff, ſubject to the opinion of the Court upon this caſe.

“ That one *James Simpſon* being poſſeſſed of the dier's plant in the declaration mentioned, by an indenture dated *April* 26th, 1781, made between *James Simpſon* and the Plaintiff, after reciting that the Plaintiff in *January* 1780 ſold to *James Simpſon* a plant, &c. for 165 *l.* 6 *s.* 6 *d.* for which ſum *Simpſon* gave the Plaintiff two promiſſory notes, dated 19th *January* 1780, one for 82 *l.* 13 *s.* 6 *d.* payable the 6th *January* 1781, and the other for 82 *l.* 13 *s.*, the remainder of the ſum, payable 6th *January* 1782; and alſo reciting, that when the firſt note became due it was inconvenient for him to pay the ſame, and that he promiſed, in conſideration of the ſaid notes being given up to him, to aſſign over the plant, &c. to the Plaintiff, to which the Plaintiff agreed: it was witneſſed that as well in conſideration of the Plaintiff's delivering up the ſaid notes, as alſo 5 *s.* to *Simpſon*, paid by the Plaintiff, *Simpſon* did aſſign and deliver to the Plaintiff the ſaid plant, &c. to hold to the ſaid Plaintiff, his executors, adminiſtrators, and aſſigns for ever. And alſo farther reciting, that it had been agreed between the parties that the Plaintiff the one at bar: now that has been recogniſed as law, and ſtill remains untouched. The more modern caſes, where the rule has been narrowed, are diſtinguiſhable from that and from the preſent. In *Walker* v. *Burnell*, *Doug*. 317. the bankrupt held the goods for a ſpecial purpoſe, of which the general creditors had notice. In *Collins* v. *Forbes*, 3 *T. R.* 316. the timber was appropriated to a ſpecial purpoſe, and the bankrupt had not ſuch an ownerſhip as

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tiff ſhould let the ſaid plant to *Simpſon* for three years, from *Lady-day* 1781, *Simpſon* paying the Plaintiff 8*l.* 5*s.* 6*d.* *per annum* for the uſe and occupation thereof, and obſerving the covenants reſpecting the ſame: (theſe are covenants from *Simpſon* for paying the rent quarterly, for keeping the plant in repair, and not aſſigning it without the conſent of the Plaintiff) it was agreed that if *Simpſon* ſhould make default in any of the quarterly payments, or in the performance of any of the other covenants, then the term granted ſhould ceaſe, and the ſaid *Simpſon* ſhould deliver the ſaid plant, &c. and it ſhould be lawful for the Plaintiff to take immediate poſſeſſion of the ſame. There is a memorandum that *Simpſon* had put the Plaintiff into poſſeſſion, by the delivering of one winch. That on the 5th *July* 1783 a commiſſion of bankrupt iſſued againſt *Simpſon*, and the Defendant was choſen aſſignee, who took poſſeſſion of the plant as part of the eſtate and effects of *Simpſon*."

The queſtion for the opinion of the Court was, whether this caſe was within the ſtatute of 21 *James* 1. *c.* 19. *ſ.* 11. If not, the verdict to ſtand; but if it was, to be entered for the Defendant.

Wood for the Plaintiff. This is only a leaſe for years, reſerving a rent payable quarterly. The queſtion then is, Whether the aſſignees under a commiſſion of bankrupt are intitled to the abſolute poſſeſſion of premiſes, of which the bankrupt had only a leaſe for years? This caſe is diſtinguiſhed from all the authorities upon the ſubject; for in every one of them there was an abſolute and complete ſale. In this caſe the uſe of the chattel is only demiſed for a term, at a certain rent. The being in poſſeſſion merely is not a ſufficient ground to vitiate the whole tranſaction. In the caſes of bankers and factors, the goods they may have in their poſſeſſion do not go to the aſſignees. *Mace* v. *Cadell*, *Cowp.* 232. and *Walker* v. *Burnell*, *Doug.* 320.

Law contrà. This might probably be good between the contracting parties, but is certainly fraudulent and void as to the other creditors. It gives a falſe credit; for with reſpect to chattels, poſſeſſion always imports ownerſhip, *Mace* v. *Cadell*. In this caſe here is a fair, open, and notorious ſale of theſe fixtures to *Simpſon*; and afterwards there is a private reſale and a leaſe, ſo that to the world he appears as the abſolute owner. From ſuch a tranſaction fraud may be preſumed. But I do not think it is neceſſary for me to ſtate a circumſtance of fraud, in order to get judgment for my client. *Brown* v. *Heathcote*, 1 *Atk.* 161. *Ryall* v. *Rolle*, 1 *Atk.* 165. Ex parte *Flyn*, 1 *Atk.* 185. *Hall* v. *Gurney* in this term. (Since reported, *Cooke's Bankrupt Laws* 231.) In the buſineſs of a brewer and alſo of a dier, the utenſils, the vats, the tubs, &c. are the chief object of credit, and therefore this leaſe held out to the world an idea that *Simpſon* was poſſeſſed of this plant, and procured him credit.

Lord **MANSFIELD**. I have no doubt that this is a new experiment to defeat the bankrupt laws. The law has ſaid, that a trader cannot mortgage his effects, and at the ſame time keep poſſeſſion. What is the caſe here? He ſells and keeps poſſeſſion, and pays intereſt for the money. If this contrivance were ſuffered, it would open a door to avoid the ſtatutes, and therefore it ought not to be allowed to prevail.

BULLER J. The caſe of a banker or a factor does not come up to the preſent; for there by the courſe of trade they muſt have the goods of other people in their poſſeſſion, and therefore it does not hold out a falſe credit to the world. But none of thoſe exceptions apply.

Judgment for the Defendant.

LINGHAM *v.* BIGGS and Another.

would give him credit with the world. So alſo in *Jarman* v. *Woolloton*, 3 *T. R.* 618. *Buller* J. ſays, "It is ſufficient to ſay, that the "huſband had not the order and diſpoſition of this property with "the conſent of the real owner, the truſtee."

Adair Serjt. in ſupport of the rule. All perſonal property of which a bankrupt has the poſſeſſion, is not within the object of the ſtatute. The legiſlature, not chooſing to go that length, added the words "order and diſpoſition," &c. "ſale and alteration," &c. which words muſt be rejected, if the mere circumſtances of poſſeſſion and reputed ownerſhip are ſufficient. Indeed, if this were the caſe, job coaches and horſes, and furniture in lodgings, would be brought within the ſtatute. The act was not intended to interfere with any thing but the ſtock in trade, the poſſeſſion of which neceſſarily implies the order and diſpoſition, ſale and alteration, &c.; for a trader who is left in poſſeſſion of his ſtock, does acts every day which make him the reputed owner, and give him a degree of credit beyond what ariſes from the naked poſſeſſion. All the caſes cited for the Defendant, except *Bryſon* v. *Wylie*, are caſes of mortgage. In mortgages of realty the abſolute property veſts in the mortgagee, though the mortgagor continue in poſſeſſion: but in mortgages of perſonalty it is otherwiſe; there the property is only pledged as a ſecurity, and the abſolute ownerſhip does not paſs *de facto*, till default in payment of the money. The doctrine of ſpecific liens agrees with this principle, where a perſon is always held to have parted with the lien when he parts with the poſſeſſion. *Bryſon* v. *Wylie* was a caſe of ſtock in trade and implements of a profeſſion, which come ſo directly within the act as not to be taken out of it by any private agreement. Lord *Manſfield* there calls it, "a new experiment to defeat the bankrupt "laws," which he would not have done if he had conſidered the act as extending to houſehold furniture. The caſe of *Collins* v. *Forbes* was within all the miſchief contended for: *Kent* was the oſtenſible and reputed owner, and all the arguments with reſpect to falſe credit were urged: there no viſible alteration of the property took place; but here there was an act of notoriety; there was an execution by matter of record executed in the houſe, and therefore a viſible alteration, both by law and fact. *Jarman* v. *Woolloton* is the ſtrongeſt caſe for the Plaintiff; for the preſumption of property in a huſband is of courſe ſtronger than in a ſtranger; and the jury found a verdict for the Defendant as to the ſtock in trade, and for the Plaintiff as to the furniture.

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Marſhall Serjt. on the ſame ſide.

Cur. adv. vult.

This day the judgment of the Court was delivered by

EYRE Ch. J. This ſtood over, in order to give the Court an opportunity of looking into the caſe of *Ryall* v. *Rolle:* we were deſirous of reading over that caſe, leſt we ſhould at all break in upon what was there ſo ſolemnly decided. In effect there were but two points then agitated, and reſolved, 1*ſt*, Whether a mortgagee of goods were a true owner within the 21 *Jac.*; and much labour was employed and learned diſtinctions taken between *Hypothecation* and *Pignus*, abſolute and conditional ſale, in order to ſhew that he ought not to be ſo conſidered; but by the unanimous opinion of the Chancellor and Judges it was ruled, that a mortgagee was to be conſidered as the true owner, in oppoſition to the reputed owner. 2*dly*, Whether the truſtee of the partner of a mortgagor was to be conſidered as the true owner, and the mortgagor the reputed owner within the ſtatute. But it is very obvious that neither of theſe points much affect the preſent caſe. Perhaps the caſes which fall within the ſtatute of *James* may be divided into two claſſes; 1*ſt*, Where goods not originally the property of the bankrupt are left in his order and diſpoſition. In *Ryall* v. *Rolle*, Lord *Hardwicke* intimates a pretty ſtrong opinion that the preamble ſhould govern the eleventh cauſe, and confine it to caſes where the bankrupt was the original owner; but in later times (*a*) the ſtatute has been conſidered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his poſſeſſion the goods of another perſon, they fell within the ſtatute: this has formed a claſs of caſes as clearly within the 21 *Jac.* as the firſt claſs. Many caſes have certainly been taken out of this claſs by exceptions, as thoſe of factors. Though *Ryall* v. *Rolle* goes no further than I have mentioned, yet thus far it may be made uſe of as an authority here, that it was aſſumed throughout the whole diſcuſſion, both by the Bench and the Bar, that the words goods and chattels in the ſtatute were not to be confined to ſtock in trade or utenſils. The words were there ſuppoſed to include choſes in action, which might paſs by an act of parliament, though they could not by a bill of ſale. The caſe of an aſſignment by a bankrupt of a bond which he retains in his poſſeſſion, and conſequently of which he has the diſpoſition, ſo that he may receive the money, ſhews how the words " order and

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(*a*) *Mace* v. *Cadell, Cowp.* 232.

"diſpoſition," and "reputed owner," are to be underſtood. They are to be underſtood thus. Being allowed to have poſſeſſion of goods under circumſtances which give the reputation of ownerſhip, brings the caſe within the ſtatute; and it is fair ſo to conſider them, becauſe every man who can be ſaid to be the reputed owner, has incidentally the order and diſpoſition; not indeed between the parties, but as to general appearance. It is impoſſible for the world at large to inquire what accounts may exiſt between the parties: general credit with the world is all; if the party be the reputed owner it imports that he has the order and diſpoſition, and that he may ſell. Admitting that the words "order and diſpoſition, ſale "and alteration," might refer to ſuch goods only as a party has in his ſhop, and ready to ſell to cuſtomers, yet they cannot refer to the actual ſale, as they ſeem to import; for if the goods are once ſold they are out of the power of the aſſignees. The act ſuppoſes them to remain in the poſſeſſion of the bankrupt, and becauſe they remain there the aſſignees are allowed to take them. The words therefore muſt not have that abſolute ſenſe which they ſeem to bear, but muſt have a meaning conſiſtent with the end propoſed to be attained by the ſtatute. If a man be the reputed owner of goods, and appear to have the order and diſpoſition of them, he muſt be underſtood to have taken upon himſelf the ſale, order, and diſpoſition within the meaning of this ſtatute. We muſt ſuppoſe that he has done that which the act ſuppoſes; and certainly to hold a conſtruction at this day, different from that of all the caſes on this remedial law, could not be juſtified by the mere letter of the act. The queſtion then comes to this, Can furniture be diſtinguiſhed from other goods and chattels, to which the ſtatute would extend? Now, I think it cannot, except ſo far as it may go to ſhew that this bankrupt was not the reputed owner, did not appear to have, and therefore had not the order and diſpoſition; and it was fairly admitted by my Brother *Adair*, that it was not worth while to go to another trial on that point: Mrs. *Munday* had been in ſuch poſſeſſion, that no Jury could have heſitated to pronounce her the reputed owner. That being admitted, I think it neceſſarily follows from her being the reputed owner, that ſhe will appear to the world to have the order and diſpoſition, ſale and alteration, *&c.* She muſt clearly derive a credit from theſe appearances, and conſequently if the owner allows her to retain the property, however fair that may be between herſelf and the owner, it muſt be a fraud upon the creditors.

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Another.

It has been ſuggeſted that this doctrine would go to an inconvenient length, and it was ſaid by way of inſtance, that no trader could go into a ready-furniſhed houſe, or hire horſes on a job, becauſe poſſeſſion would create a reputation of ownerſhip, and conſequently the furniture and horſes would be liable to be ſeized. I admit that poſſeſſion is always evidence of ownerſhip, and with nothing to oppoſe it, would create a reputation of it: but it is evidence which may be oppoſed, and ſo ſatisfactorily oppoſed as to deſtroy that reputation. Let us purſue this idea. A reſpectable tradeſman reſiding in his own houſe in *London*, takes a journey for two months to *Brighton*, or ſome other ſea-port, and hires a ready-furniſhed houſe: all the world would ſay that he was the reputed owner of the furniture in the houſe in *London*, and not the reputed owner of that in the houſe at *Brighton*. So as it is notorious that people do not always drive their own coaches and horſes, poſſeſſion in ſuch a caſe is only equivocal, and too equivocal to create a reputation of ownerſhip; it would therefore be neceſſary to go into other evidence to determine of what character the poſſeſſion was. I have no apprehenſion of this doctrine going to an inconvenient length.

It has been ſuggeſted alſo, that moſt of the caſes are caſes of mortgage, and that they are not in their circumſtances like the preſent. But when once it is determined that a mortgagee is an owner within the ſtatute of *James*, they will be found to be the ſame in principle. Two caſes have been principally relied on at the bar; that for the Defendant was *Bryſon* v. *Wylie*, and that for the Plaintiff was *Jarman* v. *Woolloton*, which laſt happened to be a caſe of furniture, and was held not to be within the ſtatute of *James*. I am unable to perceive in thoſe two caſes, or in *Collins* v. *Forbes*, any difference in the rule of conſtruction with reſpect to the ſtatute. They are caſes where the circumſtances to which the ſtatute was applicable lead the Court to different concluſions: perhaps both of them were right; but it is ſufficient to ſay that neither of them has any thing in common with the preſent caſe: poſſibly they would not govern other caſes much nearer to them in circumſtances than this. Notwithſtanding *Bryſon* v. *Wylie*, I can ſuppoſe that a dier may be in poſſeſſion of a plant, without being the reputed owner; I can alſo ſuppoſe caſes where a truſtee for a married woman permitting the huſband to take poſſeſſion of the goods and chattels, and to become the reputed owner to all the world, may loſe thoſe goods in conſequence.

quence. We cannot argue from the circumſtance of a dier being in poſſeſſion of a plant, and being the reputed owner, that therefore this furniture ſhall be liable to be taken by the aſſignees; nor from the furniture being protected in *Jarman* v. *Woolloton*, that the furniture ſhall alſo be protected here. As to the caſe of *Collins* v. *Forbes* (*a*), we perfectly agree in that deciſion: becauſe *Kent*, the carpenter who was to do the work, was not, at the time he became bankrupt, in poſſeſſion of the goods which were lying in the king's yard, and were in contemplation of law in the poſſeſſion of the true owner, whoever he was. It was well obſerved by Mr. Juſtice *Buller* in *Walker* v. *Burnell*, that queſtions on the 21 *Jac.* have much more of fact than of law in them. I believe when once it is aſcertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownerſhip falſe credit ariſes: from that falſe credit ariſes the miſchief: and to that miſchief the remedy of the ſtatute applies. This ſeems a fair and ſound conſtruction of the ſtatute; and the preſent being confeſſedly a caſe of reputed ownerſhip, and the other terms of the eleventh ſection being incidental to reputed ownerſhip, we think the verdict proper.

Rule diſcharged (*b*).

(*a*) On the deciſion in that caſe, ſee the opinion of Mr. Juſtice *Lawrence*, as reported in *Gordon* v. *the Eaſt India Company*, 7 *T. R.* 237.

(*b*) See *Manton* v. *Moore*, 7 *T. R.* 67.

REGULA GENERALIS.

It is Ordered, that from and after the laſt day of this Term, every perſon who ſhall be admitted an Attorney of this Court (not being already an Attorney of his Majeſty's Court of *King's Bench*, or a Solicitor in the *High Court of Chancery*, or in the *Court of Exchequer)* ſhall, before he be ſworn, file with the Secondary his articles of clerkſhip, together with the affidavit of the due execution thereof, and alſo the affidavit of the due ſervice under ſuch articles, and of the notices having been given purſuant to a rule of this Court, made in *Trinity* Term, in the thirty-firſt year of his preſent Majeſty's reign.

J. Eyre.
F. Buller.
J. Heath.
G. Rooke.

Mr. Juſtice *Buller* was abſent during the whole of this Term, from indiſpoſition.

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CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS

AND IN THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

RIDOAT *v.* PYE.

Nov. 7th.

The Court will not ſet aſide an award on the ground of the witneſſes not having been examined on oath, if no ſuch objection was made at the time of their examination.

Williams Serjt. moved for a rule to ſhew cauſe why an award between theſe parties ſhould not be ſet aſide, on the ground that the arbitrator had not examined the witneſſes on oath.

It being aſked by *Eyre* Ch. J. whether the arbitrator was deſired at the time by either of the parties to examine on oath, and anſwered by *Williams*, that his affidavit did not ſtate that any objection was made to his omitting to do ſo,

Per Curiam, Then we ſhall certainly not make any objection now.

Williams took nothing by his motion.

Nov. 8th.

HASKINS *v.* MORRIS.

An order for the diſcharge of an inſolvent under the Lords' act, ſ. 16. cannot be made by a Judge in term, though ſummonſes were taken out in vacation, and the order only delayed till the begining of term by an irregularity in the affidavits.

THE Defendant was taken in execution at the ſuit of the Plaintiff in the *Tholſey* Court at *Briſtol:* during his confinement there, another action was brought againſt him in this Court by the ſame Plaintiff, to which he put in bail, was ſurrendered, and afterwards removed by *habeas corpus* to the *Fleet* priſon. While in cuſtody at *Briſtol* on the firſt action, he petitioned and obtained his groats, which were regularly paid till his removal to the *Fleet*, but had been ſince diſcontinued.

An application having been made to *Heath* J. in the long vacation to diſcharge the Defendant under the 32 *G.* 2. *c.* 28. *ſ.* 13. three ſummonſes were then taken out; and had the affidavits been regular, the Defendant might have been diſcharged before the term began: but having been delayed by ſending to *Briſtol* for the proper affidavits, he was brought up before *Buller* J. at his chambers, on a day in term; who doubted firſt, whether under the words (*a*) of the act, he had a power to diſcharge the Defendant out of execution in an action brought in the *Tholſey* Court at *Briſtol*; ſecondly, whether, as the application to him was made in term time, he could conſider himſelf as only carrying into effect the former proceeding before *Heath* J. in vacation, or whether the diſcharge muſt not now be by the Court.

The Court were of opinion, that as no order had been made, this ought to be conſidered as an original motion. And accordingly granted a rule *niſi*, which was afterwards made abſolute without oppoſition.

Williams Serjt. for the Defendant.

(*a*) The words are, "If any failure ſhall at any time be made in the payment of any weekly ſum which ſhall be ordered by any ſuch Court to be paid to any ſuch priſoner, ſuch priſoner, upon application in term time to the Court where the ſuit in which any ſuch priſoner ſhall be charged in execution was commenced, or ſhall have been carried on, or in the priſon of which Court any ſuch priſoner ſhall ſtand committed, on any habeas corpus, or in vacation time to any Judge of any ſuch Court, may by the order of any ſuch Court or Judge be diſcharged out of cuſtody on every ſuch execution."

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Nov. 8th.

HICKS *v.* RICHARDSON.

If an arbitrator award, among other things that each party ſhall pay a moiety of the coſts of the arbitration and of making the ſubmiſſion a rule of Court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment againſt the other party if he refuſe to pay his moiety.

THE parties in this caſe having ſubmitted to arbitration, and the ſubmiſſion having been made a rule of Court, the arbitrator awarded 10*s.* 1*d.* as the balance due to be paid by the Defendant to the Plaintiff, each party to pay his own coſts of ſuit, a moiety of the coſts of the arbitration and of making the ſubmiſſion a rule of Court, and to execute a releaſe to the other party. After notice of the award made, the Defendant, in order to get it out of the hands of the arbitrator, paid the whole expence of the arbitration; then tendered the ſum awarded, together with a releaſe to the Plaintiff, and called upon him to pay a moiety of the expence of the arbitration and of making the ſubmiſſion a rule of Court, and to execute a releaſe on his part; this the Plaintiff altogether refuſed.

A rule *niſi* for an attachment againſt him for not performing the award having been obtained by the Defendant,

Williams Serjt. ſhewed cauſe, and contended, That it was not competent to the Defendant to pay the whole expence of the arbitration, and then apply for an attachment againſt the Plaintiff for non-payment of his moiety; but that he ought to reſort to another remedy.

Le Blanc Serjt. in ſupport of the rule.

EYRE Ch. J. We ſhall accommodate the form to the ſubſtance of the thing, if we are ſatisfied that the Plaintiff has refuſed to pay his moiety of the coſts. Shall we oblige the arbitrator to bring an action? Should we not have allowed *him* to ſay on this ſort of application that the coſts of the arbitration amounted to ſo much, and that by the terms of the award they were to be paid by both parties, and that this Plaintiff had refuſed to pay his moiety? I conſider this motion in the ſame light as if the arbitrator had come to enforce the attachment. On the ſubſtantial juſtice of the caſe, the Plaintiff is bound to pay his moiety of the coſts. He has ſubmitted by a rule of Court to pay them, and the Court will enforce the payment by attachment. It is all matter of form whether the arbitrator himſelf applies for the attachment or the party who has paid the money to the arbitrator. I cannot but think that it was the better courſe to be taken in this caſe, for the arbitrator to get the whole coſts from the Defendant by withholding the award, who may redreſs himſelf by one attachment, than for the Defendant to have an attachment againſt the Plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment againſt him, for the moiety of the coſts of the arbitration. What a ſcene of litigation expence and vexation might this ſtrictneſs produce? Suppoſing no objections to the expences themſelves I think the attachment ſhould iſſue.

Buller J. My doubt is this. The money has been advanced voluntarily, and without application from the Plaintiff, and the Defendant comes for an attachment as grounded on the award. Being a mere voluntary payment on the part of the Defendant, I doubt whether the Plaintiff is ſtrictly liable to an attachment. Suppoſe the arbitrator had awarded the expences of the arbitration to be paid by the parties jointly and not ſeverally.—However, I am perfectly ſatisfied that no injuſtice will be done; the Plaintiff is certainly bound to pay ſome way or other: if therefore the Court are inclined to grant the attachment, I ſhall not oppoſe it.

Heath J. I cannot conſider this as a mere voluntary payment of money, ſince the Defendant could not have got the award out of the hands of the arbitrator till all the expences were paid.

Rooke J. It is clear that one man cannot pay the debt of another officiouſly. But in this caſe there is one circumſtance on which I lay great ſtreſs. It was neceſſary to make the ſubmiſſion a rule of Court; at leaſt the attachment is right to enforce the payment of half the expences of that proceeding. I do not like attachments on equitable grounds, and I think that the Court ſhould be very ſtrict in granting them. But ſince there is a legal ground as to part, and as it is the opinion of the Court that no injuſtice will be done, I ſhall not oppoſe the attachment.

Eyre Ch. J. added, that perhaps on ſtrict legal grounds the arbitrator ought to have applied for the attachment to enforce payment of the coſts of the arbitration, but that he was unwilling to force arbitrators to come into Court.

Rule abſolute.

Holland *v.* Palmer.

Nov. 9th.

If any one of a bankrupt's creditors, though without the privity of the bankrupt, be induced by money to ſign his certificate, it is void.

Declaration for goods ſold and delivered, and common money counts. Plea, That after the cauſe of action accrued, and before the commencement of the ſuit, the Defendant became a bankrupt and obtained his certificate.

At the trial of this cauſe before Lord *Kenyon* at the ſummer aſſizes for *Stafford*, it was proved that *Richard Pope*, one of the creditors who had ſigned the certificate, had received ten guineas for ſo doing from one *Griffiths* the Defendant's brother-in-law, but without the privity of the Defendant. It was contended on the part of the Plaintiff that the certificate was avoided by this circumſtance under 5 *Geo.* 2. *c.* 30. Lord *Kenyon* heſitated, but the inclination of his mind was that the certificate was void: and a verdict was accordingly found for the Plaintiff, ſubject to the opinion of this Court.

Adair Serjt. now moved for a rule to ſhew cauſe why the verdict for the Plaintiff ſhould not be ſet aſide, and a verdict be entered for the Defendant. He contended that the acceptance of a ſum of money by a creditor as an inducement to ſign the certificate, if without the privity of the bankrupt, did not vitiate the certificate ſo ſigned. He ſaid the caſe of *Robſon* v. *Calze*, *Doug.* 228. cited *Cooke's B. L.* 351. contained an implication in his favour; for as the argument there turned on the knowledge of the bankrupt at a particular time, *viz.* the time of the allowance of the certificate by the Chancellor, it ſeemed to admit that if the bankrupt had not known it at all, the certificate would not have been void. He added, that if it were otherwiſe it would be in the power of an enemy to deprive the bankrupt of the benefit of his certificate by maliciouſly advancing money to a creditor.

Buller J. It is no matter whether the bankrupt knew of the money being paid or not; it was a fraud on the reſt of the creditors. One of the creditors has obtained money which ought to have been divided among all of them. By ſo doing he has obtained an advantage. Beſides, the others may have been induced to ſign by his example.

Eyre Ch. J. This has always been the impreſſion on my mind, and I ſhould have had no difficulty upon it at *Niſi Prius.* I do not feel the weight of the diſtinction between the party

coming

coming to the knowledge of the money paid juſt before the allowance of his certificate, and at any time before. The certificate is as improperly obtained, whether the bankrupt knows of the circumſtance or not. My Brother *Buller*'s obſervation is extremely ſtriking. If a conſiderable creditor be induced by money to put himſelf at the head of the liſt, the majority in number and value may be obtained by that means; ſince others may be unwilling to refuſe ſigning, when one of the moſt conſiderable has conſented. The bankrupt is to have the benefit of the certificate, provided the genuine ſenſe of the body of creditors appears in his favour; but if it is not the genuine ſenſe that appears, the certificate is no longer that fair act which ought to have any effect. I ſhould not, therefore, agree to the caſe which has been put, of money paid maliciouſly. I ſhould think that a certificate ſo obtained would be bad; but the bankrupt would be at liberty to procure another. On this caſe I have no difficulty whatever.

HEATH and ROOKE, J^s^. being of the ſame opinion,

Adair took nothing by his motion.

Nov. 10th.

JACOBS ~~One, &c.~~ *v.* STEVENSON.

The Court will not ſtay proceedings till ſecurity is given for the coſts, in an action by a foreign ſeaman ſerving on board an *Engliſh* ſhip.

THE Plaintiff in this action was a foreign ſailor, ſerving on board an *Engliſh* ſhip, and declared in trover for a cheſt.

Le Blanc, Serjt. now moved for a rule to ſhew cauſe, why the proceedings ſhould not be ſtayed till the Plaintiff ſhould give ſecurity for the coſts of the action. He admitted, that the inclination (*a*) of the Court had been not to adhere to the general rule with reſpect to foreigners, in the caſe of ſeamen ſerving on board *Engliſh* ſhips, leſt they might be diſcouraged from entering into our ſervice: but contended, that the exception was confined to caſes where they ſued for their wages.

EYRE, Ch. J. This motion cannot be ſupported in the caſe of any foreigner if he be reſident in this country. Now the Court may aſſimilate the caſe of foreigners ſerving on board *Engliſh* ſhips, to that of foreigners reſident in this country. Perhaps the preſent Plaintiff is ſerving on board an *Engliſh* ſhip bound to the port of *London*. He may, indeed, be a foreigner, but he is juſt as amenable to the juriſdiction of the Court as any *Engliſh* ſailor in

(*a*) *Henſchen* v. *Garves*, 2 *H. Bl.* 383 and 384. n. *b.*

the ſame ſituation. The ſame reaſons which influenced the Court in their former deciſions on this ſubject, will influence them in the preſent caſe.

Le Blanc took nothing by his motion.

HIGGINSON *v.* NESBITT.

Nov. 10th.

The Court will give leave in the firſt inſtance to enter up judgment on a verdict reduced by an award.

ADAIR, Serjt. on a former day having moved for leave to enter up judgment in the firſt inſtance, on a verdict reduced by an award; the Court then thought that he could only apply for a rule to ſhew cauſe.

He now mentioned it again, and ſtated that it was the practice of the *King's Bench* to make the rule abſolute in the firſt inſtance, and added, that the practice of this Court ſeemed to have been ſo conſidered in a caſe of *Higginſon* v. *Bell*, in laſt *Trinity* term, where a like motion with the preſent was granted.

The Court upon this made the

Rule abſolute.

JEYES One, &c. *v.* BOOTH.

Nov. 11th.

If a defendant in cuſtody being about to execute a warrant of attorney to confeſs judgment, is informed that it muſt be done in the preſence of an attorney on his part, and thereupon produces a perſon as ſuch, in whoſe preſence he executes the warrant of attorney; the Court will not ſet aſide the proceedings thereon, becauſe the perſon ſo produced by the Defendant was not an attorney.

ADAIR, Serjt. obtained a rule calling on the Plaintiff to ſhew cauſe why the judgment entered up, and the *ca. ſa.* iſſued in this caſe, ſhould not be ſet aſide with coſts, on an affidavit ſtating, that the judgment was entered up on a warrant of attorney executed by the Defendant, when in cuſtody in the *Fleet* priſon, he having no attorney preſent on his behalf.

The facts were theſe: The Defendant being in cuſtody for the debt of a third perſon, but being ſuperſedable, was informed, that if he was ſuperſeded, he would be detained at the ſuit of the Plaintiff, who was an attorney: upon this he ſent for the Plaintiff, who by his direction prepared the warrant of attorney in queſtion; the Defendant took it into his hand, read it, and was proceeding to execute it, when the Plaintiff informed him that he muſt have an attorney on his part preſent at the execution; accordingly the Defendant went into another part of the priſon and brought with him a perſon, who being aſked by the Plaintiff whether he was an attorney, anſwered in the affirmative; he was then deſired to explain the nature of the inſtrument to the Defendant; and the warrant

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warrant was executed in his preſence. It turned out afterwards that this perſon was not an attorney, but only a clerk to an attorney.

Le Blanc ſhewed cauſe and contended, that where a party produces a perſon as an attorney who in fact is not one, that party ſhall not be allowed to turn a Plaintiff round by ſaying that the warrant of attorney is not, on that account, properly executed.

Eyre, Ch. J. If on the Plaintiff objecting, that the warrant muſt be executed in the preſence of an attorney on the part of the Defendant, the Defendant accepts the inſtrument, and takes upon himſelf to find out the perſon in whoſe preſence he ought to execute it, the Court will not, for the purpoſe of ſuch a motion as this, doubt that ſuch perſon was an attorney. The preſent application is founded on an attempt to cheat the Plaintiff.

Per Curiam Rule diſcharged with coſts (*a*).

Nov. 11th.

The Maſter, Wardens, and Commonalty of Feltmakers *v.* Davis.

The maſter, Wardens, and Commonalty of a company, cannot ſue for a penalty forfeited to the Maſter and Wardens, to the uſe of the Maſter, Wardens, and company. The 1ſt count in a declaration in debt for a penalty under a by-law, ſet forth the charter impowering the company to make by-laws, the by-law made and the breach of it; The 2d count, omitting the above particulars, ſtated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made," *&c.* and this count was on ſpecial demurrer held bad.

Debt on a by-law for 20*l.* The 1ſt count in the declaration ſet out a charter of 19 *Car.* 2. incorporating the Feltmakers' Company, giving a power to the Maſter, Wardens, and Aſſiſtants to make by-laws, and directing that the Wardens ſhould be choſen out of the Aſſiſtants. It then ſtated that a by-law was made impoſing a fine of 10*l.* on every member of the company, who being choſen Renter Warden ſhould refuſe to take upon himſelf that office, to be paid to the Maſter and Wardens for the time being, for the uſe of the Maſter, Wardens, and company; that the Defendant became a member of the company, was elected Aſſiſtant, and took upon himſelf that office, and was afterwards elected Renter Warden, which office he refuſed to ſerve, *&c.* whereby, *&c.* The 2d count and the breach were as follows: "And whereas alſo the ſaid *William Davis*, ſo being a member of the ſaid company heretofore, to wit, on, *&c.* at, *&c.* was indebted to the ſaid Maſter, Wardens, and Commonalty of the art or

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(*a*) Vid. *Birch* v. *Sharland*, 1 *T. R.* 715. *Crompton* v. *Steward*, 7 *T. R.* 19. *Gillman* v. *Hill*, *Cowp.* 141. *Hutſon* v. *Hutſon*, 7 *T. R.* 7. *Fell* v. *Riley*, *Cowp.* 281. *Watkins* v. *Hanbury*, 2 *Str.* 1245. *Barnes* v. *Ward*, *Co. Ca. Prac. C. B.* 158.

myſtery of Feltmakers of *London* aforeſaid, in the ſum of other 10*l.* which he as *ſuch* member of the ſaid company had before then forfeited to the ſaid Maſter and Wardens of the ſaid company *for the uſe* of the ſaid ſociety, under and by virtue of *a certain* by-law or ordinance of the ſaid company before that time duly made, ratified, allowed, and approved, for having refuſed to take upon him, and for not taking upon him the office of Renter Warden of the ſaid company, to which ſaid office he the ſaid *W. Davis* had before then been duly elected and choſen, to wit, at, *&c.* By reaſon of which laſt mentioned premiſes an action hath accrued to the ſaid Maſter, Wardens, and Commonalty to demand and have of and from the ſaid *W. Davis*, for the uſe of the ſaid company or ſociety, the ſaid laſt-mentioned ſum of 10*l.* ſo forfeited as laſt aforeſaid, being the reſidue of the ſaid ſum of 20*l.* above demanded, to wit, at, *&c.* Yet the ſaid *W. Davis* (although often requeſted) hath not yet paid the ſaid ſum of 20*l.* above demanded, or any part thereof, to the ſaid Maſter and Wardens, for the uſe of the ſaid ſociety, or to the ſaid Maſter, Wardens, and Commonalty, or to any or to either of them; but to pay the ſame or any part thereof to the ſaid Maſter and Wardens, for the uſe of the ſaid ſociety, or to the ſaid Maſter, Wardens, and Commonalty, or to any or either of them, he the ſaid *W. Davis* hath hitherto wholly refuſed and ſtill doth refuſe to the ſaid Maſter, Wardens, and Commonalty, their damage of 10*l.*"

To the 1ſt count the Defendant pleaded *Nil debet*, and to the 2d demurred ſpecially, and aſſigned for cauſes, "That the ground of the ſuppoſed forfeiture in that count, alleged to have been incurred by the ſaid *W. Davis*, is not ſet forth; and alſo that the ſaid ſuppoſed forfeiture is there ſtated to have been incurred to the Maſter and Wardens of the ſaid company, for the uſe of the ſaid ſociety, whereas the ſaid Maſter and Wardens are not the Plaintiffs in the ſaid action; and alſo that no power or authority, by cuſtom or otherwiſe, is ſet out to warrant the making any by-law or ordinance to create a forfeiture by the ſaid company; and alſo that the ſuppoſed by-law or ordinance in that count mentioned, is not mentioned to have been ratified, allowed, or approved of according to the form of the ſtatute in ſuch caſe made and provided; and alſo that no title is ſhown in the ſaid Maſter, Wardens, and Commonalty, to the ſaid ſuppoſed forfeiture; and alſo that the ſaid count is too general, and does not ſet forth the ſuppoſed cauſe of action with ſufficient certainty to enable the ſaid *William* to defend himſelf againſt the ſame; and that the ſaid count is in other reſpects defective and imperfect." The Plaintiffs joined in demurrer.

Clayton Serjt. in ſupport of the demurrer. This is the firſt inſtance of ſuch a count being brought before the Court. All the precedents ſtate, in regular order, the different facts which bring the Defendant within the penalty. A declaration ought to contain ſuch things "whereunto the adverſe party may anſwer, and whereupon the Court is to give judgment." *Co. Litt.* 303. *a.* The firſt objection to this count is, that it does not ſet out the by-law, which is the ground of the forfeiture. The words here are, "by virtue of a certain by-law:" *non conſtat* that the by-law alluded to is a good one. To ſhew that any penalty is incurred under a by-law or ſtatute, the party muſt be brought within the terms of that by-law or ſtatute. In the latter caſe it is the common practice: and the Court will not be more favourable to a penalty under a by-law, than to a penalty impoſed by the Legiſlature. As the by-law is not ſet out, the Defendant is deprived of the opportunity of taking the opinion of the Court on its validity. The ſecond objection is, that it does not appear that the Feltmakers' company had any authority to make the by-law in queſtion. In the Vintners' company v. *Paſſey*, 1 *Burr.* 235. a plea ſetting up a by-law as a defence, and not ſhewing the authority of the Court which made it, was admitted to be bad. In *Com. Dig.* tit. *Pleader*, (2 W. 11.) it is ſaid, "a declaration for a penalty of a by-law muſt ſhew a power to make, by-law made, and breach," and refers to 2 *Vent.* 243. 1 *Bro. Ent.* 170. There are many other precedents in *Brown* to the ſame effect; to which may be added *Lilly's Ent.* 153. The third objection is, that the liability of the Defendant is not ſtated. It is only averred that he was a member of the company, but in order to incur this penalty he muſt not only be a member of the company, but one of the aſſiſtants. The laſt objection is, that the Plaintiffs have no right to ſue for the penalty. It is forfeited to the Maſter and Wardens, to the uſe of the Maſter, Wardens, and company. Now if a ſum be forfeited to *A.* and *B.* what right can *A. B.* and *C.* have to claim it?

Per Curiam. As to the ſecond objection, the power of making by-laws is incident to every corporation (*a*), either by the body at large or by a ſelect part; and it is in the latter caſe only that the

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(*a*) 10 *Co.* 31. *a.* *Norris* v. *Staps.* *Hob.* 211. City of *London* v. *Vanacre.* 5 *Mod.* 439. 12 *Mod.* 270. S. C. 1 *Salk.* 142. S. C. *Carth.* 482. S. C. Lord *Ray.* 498. S. C. *Holt* 431. S. C.

power need be ſhewn (*a*). The Court of Lord Mayor and Aldermen, which made the by-law relied on in the plea in 1 *Burr.* 235. was collateral to the company of Vintners; it was a different body, having no ſuch neceſſary relation to the Vintners' company as the Court could take notice of judicially. As to the 3d objection the preſent Defendant is ſtated to be "ſuch member," *i. e.* that member which is before deſcribed in the firſt count.

Le Blanc Serjt. for the Plaintiffs. In old time it was neceſſary to ſtate many things at length which are not now required. Thus *indebitatus aſſumpſit* for fines and tolls has been held good, Mayor of *Exeter* v. *Trimlet*, 2 *Wilſ.* 95. even on ſpecial demurrer. *Seward* v. *Baker*, 1 *T. R.* 616. *Whitſield* v. *Hunt*, *Doug.* 727. *n.* The declaration in the Barber Surgeons of *London* v. *Pelſon*, 2 *Lev.* 252. appears to have been a general (*b*) *aſſumpſit* for the penalty of a by-law, and was held good on demurrer. It does not appear by the words of the general count that the preſent penalty is forfeited to the Maſter and Wardens to the uſe of the body at large. Even if it did, I ſubmit that the party for whoſe benefit the penalty is forfeited may bring the action (*c*). If a promiſe be made to *A.* for the benefit of *B.*, *B.* may maintain an action on that promiſe. The Maſter and Wardens as ſuch have no power to ſue and be ſued; the only way in which they could declare muſt be as individuals; one with an averment that he was at the time Maſter, the others with an averment that they were at the time Wardens. But if theſe individuals died, they could not ſue by their executors.

Eyre Ch. J. The forfeiture in queſtion is to be paid to the Maſter and Wardens, to the uſe of the Maſter, Wardens and company. If the by-law is badly framed, it is the fault of thoſe who framed it. If they have choſen to empower their Maſter and Wardens to ſue, the Court cannot look any further: no regulation

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(*a*) See the *King* v. *Lyme Regis*, *Doug.* 158, 159.

(*b*) It was obſerved by the Court that as the neceſſity of a *ſpecial* count was not the point on which the Barber Surgeons v. *Pelſon* turned, all the neceſſary circumſtances might poſſibly have been ſtated on the record, though they do not appear in the report. But on a reference to the record, *B. R. Paſch.* 31 *Car.* 2. *Rot.* 428. in the *King's Bench* treaſury office, the declaration appears to be only a *general indebitatus aſſumpſit*, for a ſum forfeited *by virtue* of a by-law of the company, &c.

(*c*) In *Marchington* v. *Vernon* and others, Sittings at *Guildhall*, *Trin.* 27 *G.* 3. *B. R.*, which was *aſſumpſit* on a bill of exchange, by the holder againſt the Defendants (aſſignees of the drawee), who had given a promiſe to the drawer that they would honour the bill, *Buller* J. ſaid, Independent of the rules which prevail in mercantile tranſactions, if one perſon makes a promiſe to another for the benefit of a third, that third perſon may maintain an action upon it. See *Comb.* 219.; 8 *Mod.* 117. alſo *Dutton* v. *Pool*, 1 *Vent.* 318. 332. cited and relied on by Lord *Mansfield* in *Martyn* v. *Hinde*, *Cowp.* 443.

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with reſpect to the payment of the money by them to any other perſons will vary the right of action. As to the caſe put at the bar, of a promiſe to *A.* for the benefit of *B.* and an action brought by *B.*, there the promiſe muſt be laid as being made to *B.*, and the promiſe actually made to *A.* may be given in evidence to ſupport the declaration. The Maſter and Wardens may bring the action, and apply the money to the uſe of the company. They may ſue in the ſame manner as the Chamberlain of *London* (*a*) does for the Corporation of *London*: and they would probably declare both in their natural and official capacities. But in truth this is but one of many objections. I think this count is perfectly new, and cannot be ſupported. I would go as far as poſſible to prevent loading the record with unneceſſary matter: but if I find myſelf obliged to pronounce that the matter omitted is neceſſary, (and as at preſent adviſed it does appear ſo to me,) and that no reference is made to the by-law on which the forfeiture accrues, I muſt hold the count bad, unleſs a ſeries of authorities could be ſhewn to prove the contrary. It is not ſtated in this ſecond count, that the by-law under which the forfeiture accrued, which is the ground of that count, is the ſame by-law as that mentioned in the firſt count: it only ſays, "by a certain by-law." Now if we cannot refer to the firſt count in order to get at the conſtitution of the Corporation, which is to determine where the power of making by-laws reſides, and that the by-law in queſtion was actually made according to that conſtitution, this demurrer muſt prevail. I never yet ſaw a count on a forfeiture of this kind which did not ſtate all theſe circumſtances. It may not have been amiſs to try if one of theſe general counts could be ſlipped into practice, but here unfortunately the blot has been hit. In the caſe of tolls, I ſuppoſe the Court proceeded on the idea that they were known to conſtitute a right of action, and calling them tolls generally was held ſufficient. But in debt on bond, if the Plaintiff were to ſtate generally in his declaration, that the Defendant "was indebted to him on a certain bond," it would not be good. This claim for a penalty under a by-law ariſes on ſomething in the nature of a ſpecialty. It is true that in *aſſumpſit* greater latitude is allowed: becauſe after all it comes to a queſtion upon evidence what legal conſideration there is either to ſupport or to raiſe the *aſſumpſit*. I muſt confeſs I think that it was an extraordinary propoſition to admit, that theſe general counts were good in the caſes of tolls and copyhold

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(*a*) Vid. the Chamberlain of *London's* caſe, 5 *Co.* 63. and *Hollings* v. *Hungerford*, cited 1 *Wilſ.* 235. which was debt on a by-law by the Chamberlain of *Briſtol*.

copyhold fines, and I wonder that the Courts ever went that length.

Per Curiam. Judgment for the Defendant.

GREENSILL *v.* HOPLEY.

Nov. 15th.

The Court will reject bail who have received a verbal promiſe of indemnity from the Defendant's attorney; but will give time to put in freſh bail.

Bail being brought up to juſtify, and it appearing on their examination that though they had no written indemnity, yet that they looked to the honour of the Defendant's attorney for being indemnified, who had ſaid that they ſhould not be ſufferers;

Palmer Serjt. who oppoſed them, cited the rule (*a*) of Court *Hil.* 37 *Geo.* 3.

Le Blanc Serjt. for the Defendant.

The Court refuſed the bail, but ſaid, that as this was preſſing the rule to its utmoſt extent, they would allow the Defendant time to put in freſh bail.

(*a*) *Hil.* 37 *Geo.* 3. "It is ordered that from and after the laſt day of this term no perſon or perſons ſhall be permitted to juſtify himſelf or themſelves as good and ſufficient bail for any Defendant or Defendants in this Court, if ſuch perſon or perſons ſhall have been indemnified for ſo doing by the attorney or attornies concerned for ſuch Defendant or Defendants."

ROBERT ALMGILL and ISABELLA his Wife Demandants *v.* JAMES BRADSHAW PIERSON the Elder, and JAMES BRADSHAW PIERSON the Younger, Tenants.

Nov. 16th.

Judgment as in caſe of a nonſuit may be entered up againſt the demandant in a writ of right; nor will the Court relieve him if he has conducted himſelf unfairly towards the tenant in the courſe of the proceedings.

Adair Serjt. on a former day obtained a rule to ſhew cauſe why judgment as in caſe of a nonſuit ſhould not be entered up in a writ of right.

The tenants had been in poſſeſſion ſince the year 1746; iſſue in the cauſe was joined *Trinity* term 1796; notice of trial was given at the *Lent* aſſizes 1797, when the grand aſſize was elected; but the demandants neglected to proceed to trial at the *Summer* aſſizes following.

Williams Serjt. on this day ſhewed cauſe. Though the 14 *G.* 2. *c.* 15. only makes uſe of the words "Plaintiff" and "Defendant," yet from the authorities and practice on the ſubject it ſeems admitted, that judgment as in caſe of a nonſuit may alſo be had againſt demandants. *Newman* v. *Goodman* (a), 2 *Bl.* 1093. 1110. The reaſon why we did not proceed to trial at the laſt *Summer* aſſizes was, that we ſhortly expected to obtain material evidence from *France*, *viz.* the Baptiſmal Regiſter of the elder *Pierſon*, whoſe legitimacy was to be diſputed. This caſe differs from all others, for where iſſue is joined on the right, any judgment is peremptory and may be pleaded in bar to every other action on the ſame right. The eſtate in queſtion is 3000 *l.* a-year.

It was ſtated by *Rooke* J. that an application had been made to him by the tenants, for leave to examine a witneſs on interrogatories, who was going to *Naples* with her huſband and child, to which the dmandants refuſed to conſent.

Eyre Ch. J. In a common caſe I ſhould have been inclined to think the excuſe ſet up by the demandants ſufficient: but the meaſure which they mete to others we ſhall mete to them. When they had the ſtaff in their hands they tried to put difficulties in the way of the tenant, and made them riſk the loſs of an important witneſs. It was the demandants who made the attack, and who ought therefore to have been prepared to ſubſtantiate their claim before they made it. I ſhould be inclined to give more indulgence to the tenants than to the demandants, who come in this caſe to diſturb a very long poſſeſſion, on grounds which may perhaps be good, but which ſhould be known to be good before the action is commenced. According to the demandants' own account this piece of evidence was a new diſcovery, and collateral to the only ground on which they were induced to commence the action: nor is there any reaſonable probability for ſuppoſing that they will be able to proceed at the next aſſizes. I think the Court ought to adhere to the principle of a caſe (a) decided in laſt *Eaſter* term, where an application for putting off a trial was refuſed, becauſe the Defendant had not conducted himſelf fairly and candidly.

Heath J. I am of the ſame opinion. Having refuſed juſtice to others, the demandants are not in a ſtate to claim any indulgence from us. Moreover, as the pariſhes in *France* are now ſuppreſſed, and the regiſters diſordered, it is not very likely that the demandants will be able to obtain the evidence they want.

Rooke J. I entirely agree with my Lord that thoſe who make the attack ought to be very well prepared to ſupport it. In what paſſed before me, I think the demandants behaved very ill. On general principles therefore, as well as on this particular caſe, I think they can claim no indulgence.

(a) In that caſe however the rule for judgment as in caſe of a nonſuit had been made abſolute without oppoſition, and the only queſtion before the Court was, whether the tenant was entitled to coſts.

(b) *Saunders* v. *Pittman*, *ante* 33.

Rule abſolute.

Symmers *v.* Wason.

Nov. 16th.

Arreſt by the name of *Weſton*; declaration *de bene eſſe* againſt "*Waſon* ſued by the name of *Weſton*," and held regular. The Court will not order the bail-bond to be delivered up to be cancelled becauſe the place where the affidavit to hold to bail was ſworn, is not mentioned in the *jurat*.

A rule was obtained on a former day calling on the Plaintiff to ſhew cauſe why the proceedings in this action ſhould not be ſet aſide for irregularity, or why a common appearance ſhould not be entered and the bail-bond be delivered up to be cancelled.

Shepherd Serjt. in ſupport of the rule, now relied on the two following objections: 1ſt, The Defendant was arreſted by the name of *E. Weſton*, and the Plaintiff filed a declaration *de bene eſſe* againſt *E. Waſon*, ſued by the name of *E. Weſton*, which he contended could not be done on bailable proceſs, unleſs warranted by the defendant's putting in bail above in a different name from that by which he was arreſted. 2d, The *jurat* of the affidavit on which the Defendant was held to bail omitted to ſtate the place where it was ſworn.

Clayton Serjt. *contrà*.

Heath and Rooke, Js. (abſente *Eyre*, Ch. J.) overruled both objections, and

Diſcharged the rule.

Jefferson *v.* The Biſhop of Durham and Others.

Nov. 20th.

The Court of *Common Pleas* has no power to iſſue an original writ of *prohibition* to reſtrain a biſhop from committing waſte in the poſſeſſions of his ſee: at leaſt at the ſuit of an unintereſted perſon. *Semb.* That no court of common law has that power. *Qu.* If the Court of *Chancery* has not?

"England, to wit. Be it remembered, that on the Morrow of the *Holy Trinity*, before the Right Honorable Sir *James Eyre* Knight, and his Brethren Juſtices of our Lord the King of the bench at *Weſtminſter*, cometh *Thomas Jefferſon*, in his own proper perſon, and giveth the Court here to underſtand and be informed, that whereas the Right Reverend *Shute* Lord Biſhop of *Durham* now is and for the ſpace of five years now laſt paſt hath been Biſhop of *Durham*, and during all that time hath been and ſtill is ſeiſed in his demeſne as of fee in right of his biſhopric of *Durham*, of and in a certain wood, or parcel of wood ground, called *Walkington Eaſt Wood*, in *Walkington* in the county of *York*, as belonging to and parcel of the poſſeſſions of his biſhopric, containing divers, (to wit,) 192 acres and one rood, and wherein during all

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the time aforeſaid, until the waſte hereinafter mentioned, were large quantities of timber and wood growing, and in part whereof there are ſtill divers large quantities of timber and wood growing; and that *John Lockwood*, Gentleman, now holds and during all the time laſt aforeſaid hath held the ſaid wood or parcel of wood ground called *Walkington Eaſt Wood*, as leſſee or tenant thereof, under the ſaid Biſhop of *Durham:* And whereas by the law of this land, biſhops, or their leſſees or tenants, or any other perſon or perſons by their or any of their licence or authority, ought not to commit waſte in the wood or wood grounds belonging to and parcel of the poſſeſſions of the biſhoprics of ſuch biſhops reſpectively; the ſaid *Thomas Jefferſon* farther gives the Court here to underſtand and be informed, that the ſaid Biſhop and the ſaid *John Lockwood*, during the time aforeſaid, agreed between themſelves to ſell the timber and wood growing in the ſaid wood or parcel of wood ground, and to divide the money ariſing from the ſale thereof between them in certain proportions; that is to ſay, one-third thereof to the ſaid Biſhop, and the other two-thirds thereof to the ſaid *John Lockwood*; and in conſideration thereof to permit, ſuffer, and authorize ſuch timber and wood to be cut down, felled, and taken away by the vendees thereof to their own uſe; and the ſaid Biſhop and *John Lockwood* have alſo agreed to grub up, eradicate, and deſtroy the timber and wood growing on the ſaid wood or parcel of wood ground, and to convert the ground and ſoil thereof into arable, meadow, or paſture; and the ſaid Biſhop and *John Lockwood*, or one of them, in purſuance of ſuch agreement, have or hath ſold the timber and wood growing in the ſaid wood or parcel of wood ground to —— *Leatham* and *William Briggs*, for a large ſum of money, to wit, the ſum of 3000*l.* to be therefore paid by the ſaid —— *Leatham* and *William Briggs* to the ſaid Biſhop and the ſaid *John Lockwood*, or one of them; and in conſideration thereof have permitted, ſuffered, and authorized the ſaid —— *Leatham* and *William Briggs* to cut down, fell, and take away to their own uſe, the ſaid timber and wood; and by virtue of the ſaid ſale, permiſſion, and authority, the ſaid —— *Leatham* and *William Briggs* have cut down, felled, and taken away to their own uſe, the timber and wood growing, in great part, (to wit,) 138 acres of the ſaid wood or parcel of wood ground; and the ſaid Biſhop and *John Lockwood*, or one of them, have or hath cauſed the ſaid laſt-mentioned timber and wood to be grubbed up, eradicated, and deſtroyed, in order

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order to convert, and have in fact converted the ground and ſoil of the ſaid laſt-mentioned part of the ſaid wood or wood ground into arable, meadow, or paſture; and the ſaid —— *Leatham* and *William Briggs* have declared, that they will, and do proceed to cut down, fell, and take away to their own uſe, by virtue of the ſaid ſale, permiſſion, and authority, the timber and wood growing in the reſidue of the ſaid wood or parcel of wood ground; and the ſaid Biſhop and the ſaid *John Lockwood* do intend to proceed in cauſing the ſame timber and wood in the ſaid reſidue of the ſaid wood or parcel of wood ground, to be grubbed up, eradicated, and deſtroyed, and in converting the ground and ſoil thereof into arable, meadow, or paſture. Whereupon the ſaid *Thomas Jefferſon* hereby humbly imploring the aid of this Court, prayeth a remedy and the writ of our Lord the King of prohibition, to prohibit the ſaid Biſhop, the ſaid *John Lockwood*, and the ſaid —— *Leatham* and *William Briggs*, from doing any further waſte in the ſaid wood or parcel of wood ground, by cutting down or felling the ſaid timber and wood there growing, or by grubbing up, eradicating, or deſtroying the timber and wood there growing, or converting the ground and ſoil thereof into arable, meadow, or paſture. And it was granted, *&c.*"

The circumſtances under which the preſent application was made, as appeared from the affidavits on both ſides, were as follow: The wood in queſtion, of which Mr. *Lockwood* had been leſſee under the late, and is now leſſee under the preſent Biſhop of *Durham*, had, previous to the year 1793, been ſubject to certain rights of paſturage in the owners and occupiers of houſes and lands in *Walkington*. About that time an act was paſſed for the incloſure of the waſtes, open fields, and commons in *Walkington*, and *Eaſt Wood* was comprehended therein. In the affidavits in ſupport of the rule, it was ſtated that at the time the above incloſure took place, aſſurances had been given by Mr. *Lockwood*, that the wood in queſtion would not be cut down; but this was denied by thoſe on the other ſide, and proof adduced of Mr. *Lockwood*'s ever having exerciſed the right of cutting timber in *Eaſt Wood*. There was no denial of the agreement complained of in the ſuggeſtion, between the Biſhop and Mr. *Lockwood* for cutting down the wood; but on the part of the Biſhop it was ſworn, that the wood was in a very decayed ſtate; that ſeventy out of the 192 acres of which it conſiſted were to be replanted, which would produce timber of greater value than the whole then ſtanding; and that the reſidue being employed in huſbandry would be for the advantage of the fee. It appeared, moreover, that *Jefferſon*, in whoſe name the application was made, was, with reſpect to the wood in queſtion, an unintereſted perſon.

In *Trinity* term, *Le Blanc* Serjt. obtained a rule to ſhew cauſe why the prohibition ſhould not iſſue, which was enlarged till this term; the parties undertaking not to fell any timber in the mean time.

Accordingly, in this term, *Shepherd*, *Heywood*, *Williams*, and *Palmer*, Serjts. ſhewed cauſe againſt the rule, which was ſupported by *Adair*, *Le Blanc*, and *Cockell*, Serjts.

The counſel who oppoſed the rule argued in the following manner: This queſtion may be divided into three heads, 1ſt, Whether a prohibition to ſtay waſte directed to a biſhop, can iſſue out of any court of common law: 2dly, Suppoſing that any court of common law may grant it, whether it can iſſue out of the Court of *Common Pleas*: 3dly, Suppoſing the Court of *Common Pleas* to have the power, whether they will grant it under the circumſtances of the preſent caſe.

1ſt, At common law waſte could be committed by three perſons only, tenants in dower, guardians in chivalry, and tenants by the curteſy, *Co. Litt.* 53. *b.* 54. *a.* 2 *Inſt.* 299. and ſome have doubted as to the latter (*a*). By *Stat. Marlebridge*, 52 *Hen.* 3. *c.* 23. and *Stat. Glouceſter*, 6 *Ed.* 1. *c.* 5. a writ of prohibition of waſte was given againſt all tenants for life and tenants for years. The *Stat. Weſt.* 2. 13 *Ed.* 1. *c.* 14. took away the writ of prohibition of waſte in all caſes, and ſubſtituted a writ of ſummons. 2 *Inſt.* 389. By another clauſe of the *Stat. Glouc. viz. c.* 13. a writ of eſtrepement *pendente placito* was given; but according to Lord *Coke*, 2 *Inſt.* 328. that is to be ſued out of the Court of *Chancery*, or the Court in which the plea is pending: ſeveral forms of this writ may be ſeen in the *Regiſter*, 76, 77. which are not founded on the common law, but are all *contrà formam ſtatuti*; beſides here, no plea is pending. After judgment indeed, a writ of eſtrepement lies at common law, *Reg.* 77. *Reg. Judic.* 13. 2 *Inſt.* 319. but it is equally obvious that ſuch a writ does not apply to the preſent caſe. Again another prohibition (*b*) lies by the 35 *Ed.* 1. *Stat.* 2. *Ne rector proſternat arbores in cæmeterio*, &c.

(*a*) *Reg.* 72, 73. *Bro. Abr. tit. Waſte. pl.* 88. 2 *Inſt.* 145. *F. N. B.* 56.

(*b*) For a precedent of this writ, ſee *Thompſon's Entries*, 240.

which notwithſtanding what is ſaid in *Liford*'s caſe, 11 *Co*. 49. *b*. does not appear to be in affirmance of the common law, but an innovation. There is one writ, 2 *Roll. Abr*. 813. directed to the ſheriff, to prevent an abbot from committing waſte in the poſſeſſions of his priory; this writ is *teſte rege*, therefore out of Chancery; and a *ſcire facias* is added for the party to appear *coram nobis*: this therefore probably iſſued out of *Chancery*, returnable in the *King's Bench*, and is the only writ at all reſembling that now moved for, and this iſſued at the ſuit of the King, who was the patron, and was directed to the ſheriff and not to the party. Perhaps it was the writ alluded to by Lord *Coke*, 2 *Inſt*. 299. which went to the ſheriff to *prevent* waſte, and which, he ſays, may be uſed at this day. The prohibition of waſte directed to the party which lay at common law, having been taken away by the *Stat. Weſt*. 2. the preſent motion cannot be ſupported unleſs upon ſome diſtinction in favour of the Crown.

This is an application for a prerogative writ, without any other foundation than the angry *dicta* (*a*) of Lord *Coke*, ſitting in the *King's Bench*, and aſſerting the juriſdiction of that Court by throwing out an invitation to all the King's ſubjects to move for ſuch a writ; and yet it is remarkable, that, in the courſe of 200 years, no perſon appears to have accepted the invitation. For his own opinion he had no other ground than a caſe in parliament which occurred 300 years before that time, *viz*. the Biſhop of *Durham*'s caſe, 35 *Ed*. 1. (*b*) *Rot. Parl*. vol. i. p. 198. No. 46. That caſe ſeems to have been much miſunderſtood. *Anthony Beak* was then Biſhop of *Durham*, of whom Lord *Coke* ſays, 4 *Inſt*. 216. in the margin: "This was *Anthony Beak* of that ſtate and greatneſſe (*c*) as never any biſhop was, *Wolſey* except." By a record of 33 *Ed*. 1.

(*a*) In 1 *Roll*. 86. ſpeaking of the writ of prohibition to a biſhop, he ſays, "If any man will move it, I will grant it;" and in 1 *Roll*. 335. and 3 *Bulſt*. 91. "any one may have this writ againſt him (a vicar), for it is the writ of the King."

(*b*) PETITIONES IN PARLIAMENTO.
A. D. 1306. 35 *Edw*. I. No. 46.
Ant. Bek.

Voille noſtre Seigneur le Roy entendre qe Sire Antoyn Eveſq; de Dorem waſt & deſtruit tut le Boys apurtenaunt a ſa Egliſe en l'Eveſche de Dorem p doun & vent & mauveiſe garde & p mettre forges de fer & de plume & de arder Carbons. E etre ce il charge les bondes del Eſgliſe p diverſes miſes et taillages auxi bien des damages qe le Priour de Dorem' & autre Gentz ount deſrene vers lui devaunt les Juſtices nre Seignr le Roy pur treſpas donnt ill eſt atteint, come d'autre manere de taillages, qil ſount ſi enpoveriz qil ne pount leur terre tenir dount ſi nre Seignr le Roy qe eſt avowe del Eſgliſe avantdite ne y mette remedie l'Eſgliſe avantdite ſera diſherite & enpoverie en prejudice nre Seignr le Roy & de ſa Corone & du Chapitre de Doream.

Reſponſio.—Ita reſponſum eſt. Inhibeatur per breve de Cancellaria Epiſcopo & miniſtris ſuis ne faciant vaſtum de contentis in petitione.

(*c*) Vid. alſo *Stowe's Chronicle*, p. 207.

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Rot. 101. cited by *Noy* Attorney-General, *Cro. Car.* 253. it appears that the Biſhop of *Durham* pretended he had ſuch privileges, that the King's writ ought not to run there, and becauſe one brought the King's writ there, impriſoned him; and for this cauſe it was adjudged, that he ſhould loſe his liberties for his time. And we may collect from *Rot. Parl.* vol. i. p. 197. No. 39. (*a*) p. 205. No. 77. (*b*) which are both of the 35 *Ed.* 1. that the temporalties of the Biſhop, together with the *regalis libertas*, were then in the hands of the King (*c*); for with the *regalis libertas* the temporalties paſſed, as the demeſnes of a lord go with the manor, and the profits and rents of burgage lands with the borough, *Madox Firma Burgi*, p. 7. 251. Nor is this at all improbable, ſince the temporalties of the Biſhop of *Norwich* were ſeized a few years before for a ſimilar offence, as appears by *Trin.* 21 *Ed.* 1. *Rot.* 406. cit. *Cro. Car.* 253. If it be true that the King was in poſſeſſion of the temporalties, we may ſuppoſe that the aid of parliament was called in to prevent ſo powerful a ſubject as *Anthony Beak* from committing waſte on lands belonging to the Crown. The caſe of the Biſhop of *Durham*, 35 *Ed.* 1. was probably a petition of the commons on the relation of the Dean and Chapter, to the King ſitting in council, that is, the council of peers, and there-

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(*a*) A. D. 1306. 35 *Edw.* I. No. 39.

Uxor Will'i le Mareſchall.

Ad peticoem Beatricis que fuit uxor Willi de Mareſchal petentis remedium ſuper eo, quod cum Ricus pater ejus feofaſſet &c. et poſtmodum ten' illa devenerunt ad manus Antonii Epiſcopi Dunolm' tempore cujus dictus Willus vir ſuus obiit, poſt cujus mortem ſequebatur ad Epm exigendo jus ſuum qui nichil ei inde facere voluit p quod ſupplicat Domino Regi deficut illa non habet aliam ſuſtentacoem quod remedium et jus ſibi fiat ne pereat pro defectu. Et dicit quod dicta tenementa ſunt in Werk in Tyndale infra libertatem et ſunt *in manu Regis ſimul cum aliis terris* que fuerunt in manu dicti Epi infra eandem libertatem, &c.

(*b*) A. D. 1306. 35 *Edw.* I. No. 77.

Ballivus Epi Dunelm'.

Ad petitionem ejuſdem Ballivi petentis remedium ſuper eo quod cum Regalis Libertas Epatus capta ſit in manu regis certis de cauſis, cuſtos dicti Epatus impendit ipſum Epiſcopum quod non poſſit habere Curiam ſuam Baron' ſicut alii liberi dicti Epatus habent, & etiam idem Cuſtos levare facit blad. ad valenc. xl. li de villanis dicti Epi pro ſuſtentatione Coronatorum & ſub-ballivorum Regis ibidem, & non diſtringit aliquem liberum ſeu villanum in dicto Epatu pro hujuſmodi ſuſtentacoe niſi tantummodo villanos dicti Epi. Et præterea idem cuſtos cepit in manum Dni Regis Burgum Dunelm', Derlington, Aukelond, Stoketon, & Gatiſheved, & mercat' et tolnet' in dicto Epatu & tenet Curias ibidem & capit proficua & jam duo Brevia de recto pendent in Curia ipſius Epiſcopi & Ballivi ſui non poſſunt ingredi cur' predictam ad faciend' partibus juſticiam: Item dictus cuſtos ſeiſivit in manum Regis manerium de Sadberg cum wapentach' eidem manerio pertinen' quod quidem manerium eſt de novo perquiſit' de anteceſſoribus Domini Regis, & eſt extraneum regali libertati dicti Epatus &c.

Reſponſio.—Ita reſponſum eſt, Mittatur ſub pede ſigilli Cancellar' iſta petitio Rogero le Branbanzon & ſociis ſuis &c. coram quibus judicium redditum fuit de regali libertate capienda in manum Regis, & ipſi ſuper hoc ordinent remedium competens quoad omnes iſtos articulos.

(*c*) Iu the account of this tranſaction in *Holingſhed's Chronicles*, vol. 3. p. 315. it is ſaid that the King levied talliages on the tenants of the ſee of *Durham*.

fore having had the concurrence of the three eſtates, may be conſidered as an act of parliament (*a*). The order made was not declaratory of the common law, for the petition not only recites waſte committed, but talliages levied on the bondſmen of the church to pay the damages which the Prior of *Durham* had recovered (*b*) in an action againſt the Biſhop; and the writ in that caſe iſſued out of *Chancery*, not as a court of juſtice, but as the repoſitory of the great ſeal, which was neceſſarily annexed to the writ; and Lord *Coke* muſt have been miſtaken when he ſaid, in *Liford*'s caſe, 11 *Co.* 49. *a.* "that the parliament did refer him to the ordinary remedy of the common law by writ of prohibition in ſuch caſe," ſince by the *Stat. of Weſt.* 2. 13 *Ed.* 1. that writ (if ever it lay againſt a biſhop) was taken away.

The accounts of the Biſhop of *Durham*'s caſe given by Lord *Coke*, when ſitting in the Court of *King's Bench*, are variouſly reported in the books. In *Stockman* v. *Whither*, *Mich.* 12 *Jac.* 1 *Roll.* 86. he is made to aſſert "that the Parliament ſaid that a prohibition ought to be granted out of the *King's Bench*, and that it was granted accordingly." And in a note in 2 *Bulſt.* 279. of the ſame year and term that "*on motion made*, the prohibition was granted by the Judges of the *King's Bench*." But in the caſe of *Knowle* v. *Harvey*, 1 *Roll.* 335. he ſays, "that it was granted in Parliament." In *Stampe* v. *Clinton*, alias *Liford*, 1 *Roll.* 100. he is again reported to have ſaid, "that it was granted in the *King's Bench*;" whereas in his own report of *Liford*'s caſe, he cites the Roll in Parliament, "*inhibeatur per breve de cancellaria*." In three books therefore he is reported to have affirmed that the writ in the Biſhop of *Durham*'s caſe went from the *King's Bench*; and probably he did ſo; but had reaſon to alter his opinion when he came to make out and publiſh his own report of *Liford*'s caſe. If however we are to conſider the writ in that caſe as a common law writ, perhaps theſe diſcordant accounts may be reconciled in this manner. Formerly the courts of common law could not grant any prohibition in any caſe, unleſs the party were in contempt of an original writ directed to him out of *Chancery*; which was not returnable either in the *King's Bench* or *Common Pleas*, but was directed to the Court or party prohibited: if notwithſtanding ſuch writ with *alias* and *pluries*, the Court or party perſiſted in doing that which was prohibited, an attachment *ſur prohibition* iſſued returnable either in

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(*a*) Vid. 1 *Bl. Com.* 182. 4 *Inſt.* 25:

(*b*) See 4 *Inſt.* 216. 1 *Rot. Parl. p.* 169. No. 87.

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the *King's Bench* or *Common Pleas*. *Langdale*'s caſe, 12 *Co.* 58. 38 *H.* 6. 14. abridged *Bro. Prohibition*, *pl.* 6. This was probably the original practice in all prohibitions. Afterwards theſe Courts on a fiction iſſued an original writ in prohibition to confine Eccleſiaſtical Courts within their juriſdiction; if the Judges of thoſe Courts proceeded contrary to the common law, the Courts of *King's Bench* or *Common Pleas* allowed a ſuggeſtion to be filed that they had proceeded ſo and ſo, and ſuppoſed them in contempt, as if a writ had actually iſſued out of *Chancery*: and this may ſerve to explain the words in *Fitz. Abr. Attachment ſur Prohibition*, *pl.* 15. 2 *Inſt.* 300. and 4 *Inſt.* 99. "That the common law, which in thoſe caſes is a prohibition of itſelf, ſtands inſtead of an original." This fiction did not eaſily gain ground in the *Common Pleas*. *Broke*, who was himſelf Chief Juſtice of the *Common Pleas*, doubts it (*a*). In *Mich.* 6 *Jac. Langdale*'s caſe, 12 *Co.* 58. it was debated in the *Common Pleas*, whether that Court could iſſue a prohibition to the Court of High Commiſſioners, when no plea was there pending, and it was reſolved by *Coke* Chief Juſtice and the other Judges of that Court that it might. And in the next year Lord Chancellor *Egerton* called together the Judges of the *King's Bench* and *Exchequer*, of whom he demanded whether the Court of *Common Pleas* had authority to grant any prohibition without writ of attachment or plea depending; and the above reſolution was unanimouſly affirmed. 4 *Inſt.* 99, 100. (*b*) And this ſeems to be now ſettled; for in *Buſhell*'s caſe, *Vaughan* 157. Lord *Vaughan* ſpeaking of the *Common Pleas*, ſaid, "all prohibitions for incroaching juriſdiction iſſue as well out of the *Common Pleas* as *King's Bench*." This view of the ſubject ſeems to reconcile Lord *Coke*'s different *dicta* reſpecting the Biſhop of *Durham*'s caſe. For as the fiction did not extend to prohibition of waſte, an order was probably made in Parliament, that a writ ſhould iſſue out of Chancery, directed to the Biſhop and his miniſters, and this was the ordinary remedy out of Chancery; if the Biſhop perſiſted, another writ was iſſued returnable in the *King's Bench*, and then, if he continued to waſte, he was in contempt, in which caſe the ordinary remedy was by a writ out of the *King's Bench*. But on no ground can the Biſhop of *Durham*'s caſe be conſidered as an authority for granting an *original* writ in a Court of Common law.

(*a*) See *Bro. Abr. Prohibition*, *pl.* 17.

(*b*) See alſo 12 *Co.* 109.

The firſt caſe in which the power of the *King's Bench* to iſſue an original writ in prohibition of waſte was aſſerted, was *Stockman* v. *Wither*, 1 *Roll.* 86.; alſo alluded to in the anonymous note, 2 *Bulſt.* 279. which varies from *Rolle* by ſaying, "We will grant it by the ſtat. 35 *Ed.* 1." As that however was founded on the idea that the writ in the Biſhop of *Durham*'s caſe iſſued out of the *King's Bench*, contrary to the authority of the Parliament Roll, it muſt fall to the ground. Beſides it is contradicted by a report of the ſame caſe under the name of the Biſhop of *Saliſbury*'s caſe, *Godb.* 239., where it was holden that though waſte by a Biſhop may be puniſhed in the Eccleſiaſtical Court, that a prohibition will *not* lie; and the reporter cites 2 *H.* 4. 3. where *Thirning* Ch. J. and *Tirwit* J. maintain the ſame doctrine. *Vid.* alſo *Bro. Abr. Depoſition*, *pl.* 1. The next caſe in order is *Knowle* v. *Harvey*, 1 *Roll.* 335. 3 *Bulſtr.* 158. where a prohibition was granted to a vicar by the common law for cutting down trees; but from *Bulſtrode* it appears that the trees were growing in the church-yard which would bring it within the 35 *Ed.* 1. "*ne rector proſternat arbores*, &c."; moreover the writ was moved for by the churchwardens pending a ſuit between them and the Defendant, and might therefore have iſſued under the Statute of *Glouceſter*. *Sacker*'s caſe, 3 *Bulſt.* 91. *Moor* 917. cited 1 *Roll.* 335. which comes next, was a prohibition againſt a vicar continuing in poſſeſſion of the vicarage by conſent of the parties after judgment againſt him, and was therefore either *pendente placito*, or founded on the writ in the Regiſter, *p.* 77. *Coſtard*'s caſe, 2 *Roll.* 111. was only a prohibition to a vicar under 35 *Ed.* 1. and *Drury* v. *Kent*, *Hob.* 36. to an incumbent for waſte while a *quare impedit* was pending. There is a caſe of the Lord of *Rutland*, 1 *Lev.* 107. 1 *Keb.* 557. 1 *Sid.* 152. which according to the two laſt reporters was an application for a prohibition to a rector, for opening mines in the glebe; according to *Levinz* for opening mines and cutting down trees; but from the record of the caſe, *Liber Placitandi* 246. the firſt account appears to be correct: the Court ſaid, "that if it were grantable, no mines could ever be opened in the glebe;" but added "that for cutting down trees to the deſtruction of the church, they would grant it;" probably under the 35 *Ed.* 1. All the caſes in the books have now therefore been diſpoſed of, except a caſe of *Acland* v. *Atwell*, 2 *Roll. Abr.* 813. where a prohibition was granted to a patron againſt a prebendary for cutting down trees, by Lord Keeper *Coventry*; that indeed is a very looſe note, and though we cannot ſay on what grounds it was allowed in a Court of Equity, yet we contend that there is no authority for an original writ of prohibition out of a Court of common law.

Admitting however that a prohibition may be granted againſt a parſon, there is nothing to ſhew that it can againſt a biſhop. With reſpect to a parſon the fee of the glebe is in abeyance; but the fee of the biſhoprick is in the biſhop; the latter may join the miſe in a writ of right. *Co. Litt.* 300. *b.* but the former cannot for the weakneſs of his title. *F. N. B.* 5. The ſeiſin of a biſhop may be compared to that of a corporation aggregate, and a prohibition might as well go againſt the one, as againſt the other; indeed 2 *H.* 4. 3. ſhews that a biſhop is not puniſhable for waſte at common law: and in the Lord of *Rutland*'s caſe, 1 *Keb.* 557. where a doubt was raiſed, whether a parſon could open mines, the Court ſaid, "he may well enough do it as *eveſque*." Before the 13 *Eliz.* a biſhop was ſo far ſeiſed in fee that he might alienate, and even after that time, till 1 *Jac.* 1. he might alienate to the crown.

2dly, At the diviſion of the *Aula Regis* the power of the Court of *Common Pleas* was chalked out with preciſion. Its juriſdiction ariſes in conſequence of original writs out of *Chancery*, returnable here. This appears from the words of *Bracton* 105. *b. ſine warranto juriſdictionem non habet nec coercionem*, &c. and again *Bract.* 108. *a. juſticiarii loquelas omnes de quibus habent warrantum terminantes*, &c. and from 4 *Inſt.* 99. There are indeed ſome exceptions to this rule. This Court may iſſue original writs, where their own officers are concerned; or where their own juriſdiction is to be protected from the infringements of Inferior or Eccleſiaſtical Courts. 4 *Inſt.* 99. *Langdale*'s caſe, 12 *Co.* 58. The latter right was formerly neceſſary to its exiſtence; for the Chancellor and his clerks, who in old times were all clergymen, would not have ſo framed their writs as to ouſt the Spiritual Courts of juriſdiction. If the Court ſhould grant the writ now applied for, they muſt do the ſame with reſpect to the writs *de telonio* and *ne injuſtè vexes*, of which they never take cognizance, unleſs authoriſed by writs out of *Chancery*. This is a prerogative writ: there is no diſtinction in principle between a *mandamus* and a prohibition, the one commands the party to do ſomething, the other reſtrains him from doing ſomething. Nay there is a difference between the method

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method of granting prohibition in the *King's Bench* and the *Common Pleas:* here a ſuggeſtion muſt be entered on record, for it is the ſuit of the party; there it is a commiſſion prohibitory iſſuing at the ſuit of the King on a mere ſurmiſe. *Latch.* 114. The words of Lord *Coke*, when ſitting in the *King's Bench*, "we will alſo *for the King* grant a prohibition," 2 *Bulſt.* 279. and "it is the *King's* writ," 1 *Roll.* 335. can have no application to the Court of *Common Pleas*; for its being the *King's* writ is the very reaſon why it ſhould not iſſue from this Court, which only holds pleas between party and party. But the Court of *King's Bench* has the power of iſſuing certain writs, ſuch as *mandamus* and *quo warranto*, which are peculiar to that Court where the King himſelf is ſuppoſed to ſit, and with which no other Courts, not even the Court of *Chancery*, can interfere. Beſides there is leſs objection to this writ lying in the *King's Bench*, where the crown has its officer called the King's coroner, who acts as its attorney.

3dly, This is an application to the diſcretion of the Court. 1 *Ld. Raym.* 587. If the writ were demandable *ex debito juſtitiæ*, the party need have done nothing more than file an affidavit of the truth of the ſuggeſtion; but here the Court has granted a rule to ſhew cauſe. It is to be obſerved that in all the caſes where prohibitions have been granted againſt churchmen, it has been at the ſuit of their patrons. From the record, *Liber Placitandi* 246. the application in the Lord of *Rutland*'s caſe appears to have been made by the patron, though the reports do not ſtate it ſo. In *Strachy* v. *Francis*, 2 *Atk.* 217. an injunction was granted againſt a rector on *behalf of the patron*, to ſtay waſte in a church-yard; but there the Lord Chancellor, according to a manuſcript (*a*) note and another report of the ſame caſe in *Barnadiſton's Reports in Chanc.* 399., by the name of *Bradley* v. *Stratchy*, doubted at firſt whether even a patron could have it, or whether it muſt not be obtained

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(*a*) This was a note in the margin of 1 *Eq. Ca. Abr.* 399. formerly belonging to Mr. *Brown* of the *Chancery* bar, and was as follows; "*March* 17th, 1740, at the ſeal. *Strachey* v. ———, Motion by Mr. Attorney General for injunction by the Plaintiff who was patron of the church, (and *Qu.* if ordinary was not co-plaintiff?) to ſtay waſte on lands bought out of the money for the augmentation of poor livings. Lord *Hardwicke* at firſt doubted if ſuch a bill was proper, unleſs in the name of the Attorney General, imagining the patron was only a truſtee for the church, and intereſted only as to the preſentation, and denied the injunction, but the next day he changed his opinion and granted it, ſaying it was a proper bill, in imitation of the prohibition of waſte, which the patron might have at common law; and he cited *Roll's Abr.* tit. *Waſte*, and *R. Liford's* caſe, *Co. Rep.*"

tained at the ſuit of the crown. So the injunction in *Knight* v. *Moſeley*, *Ambl.* 176. was allowed on a bill *by the patron*; and it was there ſaid by the Lord Chancellor "that an injunction has been granted againſt a biſhop at the inſtance of the *Attorney General*," though indeed on a ſearch in the Court of *Chancery*, *no* injunction to a biſhop is to be found on its records. Here the application is on the part of an unintereſted ſtranger; which if the Court were to allow, a writ might be obtained, to prevent that being done, which thoſe who have the patronage might conſider as tending to the melioration of the ſee, on the ground of its being waſte within the ſtrict terms of the common law. The only line for the Court to purſue, is to examine whether the act of the biſhop has been for the benefit of the church or not. Now it appears by the affidavits on the part of the biſhop, that in this very inſtance the moſt effectual means are taken by him for the improvement of the revenues of the ſee. If the trees belonging to the church could never be cut down, the conſequence would be that after a certain period they muſt decay, and the ſee would be rather impoveriſhed than improved. That biſhops may cut them, may be collected from the right which they formerly poſſeſſed of granting leaſes without impeachment of waſte; which right was recogniſed in the Biſhop of *London* v. *Web*, 1 *P. Wms.* 527. and the Biſhop of *Wincheſter*'s caſe, cited *Freem.* 55.: in the firſt of thoſe caſes an injunction was obtained againſt the tenant for carrying away the ſoil for bricks, and in the ſecond for cutting down all the trees at the end of his term; but both at the deſire of the biſhops for an abuſe of a privilege which their predeceſſors had a right to grant.

The Counſel in ſupport of the rule. The queſtions of law are three: 1ſt, Whether in the caſe of a biſhop felling and grubbing up the woods of his ſee, a prohibition will lie at all? 2dly, Whether it will lie in the Court of *Common Pleas*? 3dly, Whether it will lie in the Court of *Common Pleas* without plea depending? The ſtat. *Weſt.* 2. *c.* 14. was only intended to correct an error which had obtained, that damages could not be recovered for waſte done before prohibition iſſued, and for that purpoſe a writ of ſummons was given: but that it was not intended to take away the original writ of prohibition is clear from the preamble, and from Lord *Coke*'s comment on the ſtat. *Glouceſter*, 2 *Inſt.* 299. where he ſays, "this remedy may be uſed at this day." It is alſo to be conſidered whether biſhops and other eccleſiaſtical perſons who hold eſtates for *life* do not come within the ſpirit of ſtat. *Marlebridge*, *c.* 23. and ſtat. *Glouc. c.* 5. for although biſhops are held to be ſomething more than mere tenants for life, yet that is only to enable them to ſue, not to aliene their eſtates. Beſides they fall within two of the deſcriptions of perſons who were liable at common law: the church lands being conſtantly denominated the dowry of the church, and church-men being aſſimilated to tenants in dower, and alſo being looked upon as the guardians of the church, which according to the maxim of the law is always *infra ætatem*, they muſt be equally liable to a writ of prohibition with tenants in dower and guardians in chivalry. It has been contended that a biſhop is ſo far ſeiſed in fee of his temporalties, that before the reſtraining ſtatutes he had the complete diſpoſal of them, except as to abſolute alienation: and two caſes were cited in ſupport of this doctrine, 1 *P. Wms.* 557. and *Freem.* 55. but both thoſe caſes ſeem to refute the propoſition, for in both of them the Court enjoined the leſſees from doing what they certainly might have done under a leaſe from any other tenant in fee. The act of the Court in thoſe caſes can be ſupported on no other ground than this, that if the leſſee, under colour of an authority from the biſhop, was attempting the diſheriſon of the ſucceſſors of the ſee, he was exceeding that power which the biſhop was entitled to confer, and doing what the biſhop himſelf could not have done.

It has been argued that the caſes of prohibitions to ſtay waſte committed by rectors in their church-yards, were grounded on the 35 *Ed.* 1. and that that ſtatute was not in affirmance of the common law: but the church-yard is a part of the glebe, and the rector was as much reſtrained from committing waſte there, as on any other part of the glebe: beſides Lord *Coke* expreſsly ſays, in *Liſford*'s caſe, that the treatiſe, intitled "*Ne rectores proſternant*," &c. is in affirmance of the common-law.

The application of the Biſhop of *Durham*'s caſe to this has been denied. It has been contended that having received the aſſent of the three branches of the Legiſlature, it ought to be conſidered as a ſtatute; but its never having been treated as ſuch in the courts of law affords a ſufficient anſwer to that obſervation. We muſt alſo recollect that the two Houſes of Parliament at that time entertained a ſpecies of original (*a*) juriſdiction, which has been many years diſuſed. The Rolls of Parliament ſhew that the Houſe of Commons as the great inqueſt of the nation, not only preſented offences, but preferred the complaints of individuals, which were decided upon by the Crown, aſſiſted ſometimes by the councils, and ſometimes by the courts of law. Perhaps the Biſhop of *Durham*'s caſe was decided in the latter way. It ſeems to have been a preſentment by the Commons to the Crown, and by the Crown referred to the courts of law. The matter of complaint was cognizable by them: and the remedy pointed out and given, was a prohibition iſſuing ſomewhere, and applicable to the caſe of a biſhop cutting down the timber on his dioceſe. Lord *Coke*'s words in *Stockman* v. *Whither* do not contradict the Roll in Parliament. The parties were referred to the ordinary proceſs of the Courts of *Weſtminſter Hall*, and poſſibly, inſtead of applying to *Chancery*, they applied to the *King's Bench*, and ſo the prohibition went from thence: or the contradiction may be explained in the manner ſuggeſted by the counſel on the other ſide. Antiently all prohibitions may have originated in writs out of *Chancery*; and this is much confirmed by the forms of pleading at this day: for the declaration ſuppoſes ſuch a writ to have iſſued, and charges the party with having diſobeyed it, and he is proceeded againſt as if he had. It is well known that in common caſes in this Court, no original is ſued out till the record is made up: in this manner the original writ in prohibition may have been intirely diſuſed: but if the ancient practice had not been departed from ſo early as the 35 *Ed.* 1. the writ would firſt have iſſued from *Chancery*, and the proceſs upon that writ might have been made returnable in a court of common law, 38 *H.* 6. 14., and then, if that Court gave judgment upon appearance of the party, it would iſſue the ultimate proceſs which would be the effectual writ of prohibition. An attempt has been made to ſhew that the Biſhop of *Durham* was not in poſſeſſion of his temporalties at the time when the above caſe was decided; but that he was conſidered as a ſtranger treſpaſſing on the lands of the Crown: this however could not be the caſe, for he appears to have been levying talliages at that very time, on the bondſmen of the church.

But the power of the courts of common law to grant this writ does not reſt on the Biſhop of *Durham*'s caſe alone. For in

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(*a*) Vid. *Hale on Parliaments*, *c.* 17. by *Hargrave*.

Stockman v. *Wither*, 1 *Roll.* 86. Lord *Coke*, after adverting to that caſe, ſays, "and this ſeems to be good law;" and in 2 *Bulſt.* 279. it is ſaid, that the whole Court agreed with him. The ſame is again recogniſed in *Stampe* v. *Liſord*, *Roll.* 100. and *Liſord*'s caſe, 11 *Co.* 49. where it is called the ordinary remedy of the common law. That a prohibition may iſſue againſt a parſon is clear from *Knowle* v. *Harvey*, 1 *Roll.* 335. 3 *Bulſt.* 158. and though that caſe is open to the obſervation that there was a plea pending, yet it is expreſsly ſaid to have been granted by the common law on ſuggeſtion. *Sacker*'s caſe was not plea pending, for the ſuit was at an end, and Lord *Coke* there ſaid, "you may have a prohibition, not only for the patron, but alſo for any; for the ſecond incumbent: for this is the King's writ, and any one may have a prohibition for the King." Whether *Coſtard*'s caſe was under 35 *Ed.* 1. *ne rector*, &c. or not, is immaterial, ſince that ſtatute was in affirmance of the common law, and clearly a prohibition of waſte was there granted againſt a vicar on motion in the *King's Bench*. Theſe caſes are almoſt all abridged in 2 *Roll. Abr.* 813. and to them is added *Acland* v. *Atwell*, to which no anſwer has been given. In the Lord of *Rutland*'s caſe, 1 *Keb.* 557., which, according to the record in the *Liber Placitandi* 246. is the moſt accurate report, the Court ſaid they would grant a prohibition againſt a parſon for waſte in cutting trees; and in *Liber Placitandi* 240. there is a record of a ſuggeſtion for ſuch a prohibition in the *King's Bench*, which ſerves to ſhew that cutting down trees was then the ſubject of prohibition on ſuggeſtion in a court of common law. This doctrine therefore does not depend on the haſty *dicta* of Lord *Coke* in court, but was deliberately adopted by him in his cloſet, and introduced into his reports; nor does it reſt on the authority of one Judge or one reporter, but is confirmed by the repeated determinations of the whole Court, reported in different books. It ſeems alſo to have been ſanctioned by the ſubſequent opinions of Lord *Hardwicke*, 2 *Atk.* 217. *Barnardiſt.* 399. and *Amb.* 176. who granted injunctions againſt churchmen to ſtay waſte on analogy to the prohibition at common law.

2dly, A diſtinction has been attempted between prohibitions to reſtrain waſte, and to reſtrain an exceſs of juriſdiction, but has been ſupported by no authorities; and reaſon operates againſt it. It has been urged that unleſs this Court were to iſſue prohibitions to inferior Courts, its own juriſdiction would be infringed. But it may be anſwered that ſuch prohibitions iſſue on matters which

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could never come before the *Common Pleas* for judgment. Thus if an inferior Court conſtrue an act of Parliament, in a ſubject peculiar to its juriſdiction, contrary to the rules of the common law; as in caſes of prize, which are not cogniſable by this Court. *Brymer* and others v. *Atkins*, 1 *H. Bl.* 164. But ſuppoſing it had any where been holden that this Court had not a concurrent authority with the *King's Bench* in prohibiting the inferior Courts, yet in caſes of waſte, which ſeem to be peculiar to this Court, it ought to have the power of prohibition. This is called a prerogative writ, but it is alſo a civil remedy; and indeed the prohibition to the inferior Courts is as much a prerogative writ as the preſent. So *quare impedit* is a prerogative writ; and yet that is ſo peculiar to this Court, that it is an inſtance of the King's power that he may ſue it in any other Court (*a*).

3dly, It ſtands ſettled as the unanimous opinion of all the Judges, that this Court may grant prohibitions in certain caſes without plea pending. *Langdale*'s caſe, 12 *Co.* 58. 4 *Inſt.* 100. If therefore it is eſtabliſhed that the circumſtance of plea pending is not neceſſary to give juriſdiction to this Court, then all the caſes which have been cited of prohibitions granted in the *King's Bench* plea pending, may be conſidered as authorities for the *Common Pleas* to grant them where plea is not pending. In this queſtion the Court will not examine how far the timber ought, with a view to the benefit of the church, to be cut down, or whether the produce is to be employed for the reparation of the palaces or other tenements of the ſee. The intention of deſtroying the woods of the dioceſe is avowed. But the law protects the thing as it is, and the Court will not allow him who is committing what muſt be deemed waſte, to ſay, that ſuch waſte will be for the benefit of his ſucceſſors.

EYRE Ch. J. One good effect which has ariſen from the length of this diſcuſſion is, that the way has been much cleared for the conſideration of the preciſe queſtion before the Court; namely, Whether a writ of prohibition lies in the Court of *Common Pleas* to reſtrain a biſhop from committing waſte in the poſſeſſions of his ſee?

The ſtate of the common law with reſpect to waſte has been ſo fully laid open by the bar, that I need do little more than allude to it. At common law, the proceeding in waſte was by writ of

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(*a*) *Reg.* 29. 30. *F. N. B.* 32.

prohibition from the *Court of Chancery*, which was conſidered as the foundation of a ſuit between the party ſuffering by the waſte, and the party committing it. If that writ was obeyed, the ends of juſtice were anſwered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of *Chancery*, returnable in a court of common law, which was conſidered as the original writ of the Court. The form of that writ ſhews the nature of it. It was the ſame original writ of attachment which was and is the foundation of all proceedings in prohibition, and of many other proceedings in this Court at this day. *Si* (*a*) A. B. *fecerit te ſecurum, &c. tunc pone, &c. quod ſit coram juſticiariis noſtris &c. oſtenſura quare fecit vaſtam, &c. contrà prohibitionem noſtram, &c.* That writ being returnable in a court of common law, and moſt uſually in the Court of *Common Pleas*, on the Defendant appearing the Plaintiff counted againſt him; he pleaded, the queſtion was tried, and if the Defendant was found guilty, the Plaintiff recovered ſingle damages for the waſte committed. Thus the matter ſtood at common law. It has been ſaid, (and truly ſo I think, ſo far as can be collected from the text writers,) that at the common law this proceeding lay only againſt tenant in dower, tenant by the curteſy and guardian in chivalry. It was extended by different ſtatutes (*b*) to farmers, tenants for life, and tenants for years, and I believe to guardians in ſocage. That which theſe ſtatutes gave by way of remedy, was not ſo properly the introduction of a new law, as the extenſion of an old one to a new deſcription of perſons; the courſe of proceeding remained the ſame as before theſe ſtatutes were made. The firſt act which introduced any thing ſubſtantially new, was that (*c*) which gave a writ of waſte or eſtrepement pending the ſuit. It follows of courſe that this was a judicial writ, and was to iſſue out of the courts of common law: but except for the purpoſe of ſtaying proceedings pending a ſuit, there is no intimation in any of our text writers that any prohibition could iſſue from thoſe Courts. By the ſtat. of *Weſt.* 2. the writ of prohibition from the *Chancery* which exiſted at common law is taken away, and the writ of ſummons ſubſtituted in its place: and although it is ſaid by Lord *Coke*, when treating of prohibition at the common law, that it "may be uſed at this day," thoſe words, if true at all, can only apply to that very ineffectual writ directed to the

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(*a*) *Bracton, lib.* 4. *Tr.* 6. *c.* 18 & 19. 2 *Inſt.* 299. *Reg.* 35 & *al.*

(*b*) *Marlbridge, c.* 24. *Glouc. c.* 5.

(*c*) *Glouc. c.* 13.

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ſheriff, empowering him to take the *poſſe comitatûs* to *prevent* the commiſſion of waſte intended to be done. The writ directed to the party was certainly taken away by the ſtatute. At leaſt as far as my reſearches go, no ſuch writ has iſſued even from *Chancery*, in the common caſes of waſte by tenants in dower, tenants by the curteſy, and guardians in chivalry, tenants for life, &c. &c. ſince it was taken away by the ſtatute of *Weſtm.* 2. Thus the common law remedy ſtood with the alteration above-mentioned, and with the judicial writ of eſtrepement introduced *pendente lite*.

As far as can be collected from the text writers of a very early period, and from the forms of proceeding contained in books of very high authority, ſuch as the *Regiſter* and *Fitzherbert's Natura Brevium*, it ſeems that there did not occur in practice, and that there was not in fact any remedy at common law againſt churchmen committing waſte, ſufficiently known for them to treat of. *Bracton* has two whole chapters in the fourth book, on the ſubject of waſte. His obſervations are confined to perſons liable to the action in the time of *Hen.* 3., and he (*a*) gives the writ of prohibition as the foundation of the ſuit. The *Regiſter* and *Fitzherbert* take no notice of that writ, becauſe they proceed upon the law as altered by the ſtatute of *Weſtminſter* 2., and accordingly conſider the writ of ſummons as the foundation of the ſuit. But no one of them has a writ directed againſt a churchman. It is not merely that theſe books are ſilent on the ſubject, but the caſe which was alluded to, 2 *H.* 4. 3., proves to demonſtration that ſuch a courſe of proceeding at the common law againſt churchmen was not in uſe at that time. In that caſe *Thirning* Ch. Juſt. takes upon himſelf to pronounce, very authoritatively, that churchmen cannot be puniſhed at common law if they cut down all the woods of their eccleſiaſtical poſſeſſions. I will not ſay that the law was ſo, but I may ſafely make this inference from his words, that ſuch a proceeding was not uſual or in practice at that time.

Our books are full of declarations that deſtruction and dilapidation are cauſes of deprivation in churchmen, and that affords ſome argument to prove that waſte by them was not that of which it was ſuppoſed the common law could take notice, ſince it was referred to another juriſdiction. It is not very conſonant with the ſimplicity of the old law to give two remedies for the ſame evil; if

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(*a*) *Bracton, lib.* 4. *Tr.* 6. *c.* 18. *ſ.* 2. 2 *Inſt.* 299.

if a remedy was already provided at the common law, the eccleſiaſtical juriſdictions would not be allowed to interfere to the extent of deprivation. So if there was an effectual remedy by the eccleſiaſtical cenſures to that extent, it affords a ſtrong ground to infer, that there was no proceeding at common law in the ſame caſe. I cannot find, from the earlieſt writers, down to the 12th of *Jac.* 1. that it was ever underſtood or treated of in the books of common law, that any proceeding in waſte lay againſt a churchman. It was reſerved for the learning and induſtry of that great man Sir *Edward Coke*, whoſe name ought never to be mentioned in a court of law without the higheſt reſpect, to bring to light the record of the Parliament Roll of 35 *Ed.* 1., which I need not now re-ſtate, as it has been ſo often mentioned at the bar. After that record was brought to light and conſidered, Sir *Edward Coke* and the Judges of his time, thought themſelves warranted in making ſeveral very important concluſions from it: Firſt, they ſaid that the King's anſwer had a reference to the courſe of the common law; they went further, and from thence inferred, that a writ of prohibition lay at common law againſt a churchman who committed waſte; they proceeded further ſtill, in concluding that ſuch a prohibition lay in the Court of *King's Bench*, and going one ſtep beyond that, they declared that ſuch a writ of prohibition being the King's writ, and founded on his right of patronage, any man might have it. In this manner may be explained the ſtrong language of Sir *Edward Coke* as reported in 1 *Roll.* 86. "If any "man will move it, I will grant a prohibition." I do not perceive that it was obſerved at the time when this language was held, that ſuch had been the known courſe of the common law previous to the diſcovery of that record. An expreſſion which, according to the report of the ſame caſe in 2 *Bulſt.* fell from Sir *Edward Coke*, and which confirms me in the opinion that it had not been ſo underſtood by thoſe Judges, is very remarkable. Sir *Edward Coke* there ſays, "We will *revive* this proceeding:" an expreſſion which leads me to infer, that if ſuch a remedy ever exiſted, it had been buried for three centuries in obſcurity. Let me now ſuppoſe for a moment that Sir *Edward Coke* and the Judges of his time were right in their concluſions on that record; that there was a remedy at common law; that ſuch remedy was the writ of prohibition; that the Court of *King's Bench* might iſſue it, and laſtly, that any man who applied to that Court might have it; ſtill we muſt recollect that we are ſitting in the Court of

Common Pleas and not in the Court of *King's Bench*. All theſe admiſſions therefore do not prove that the Court of *Common Pleas* can iſſue ſuch a writ; and before we do iſſue it, that muſt be proved. I have watched the courſe of this argument, to ſee whether there was any inſtance, I will not ſay uſage, or even any adjudged caſe, but whether there was any inſtance to be found, where the Court of *Common Pleas* had thought itſelf authorized to iſſue ſuch a writ. I find no ſuch inſtance. There being no ſuch inſtance, we might ſtop here; we might ſay that the Court of *Common Pleas* not being a court of original juriſdiction, but deriving its juriſdiction from the great ſeal, from the *Officina Brevium*, it muſt not take upon itſelf to iſſue writs of prohibition, becauſe they are iſſued by the great ſeal, or becauſe they may have been iſſued by the *King's Bench*, for reaſons which have not been diſcloſed, or which do not apply to the Court of *Common Pleas*. But as the matter has been gone into ſo largely at the Bar, and is of importance, I will go a little farther into it here.

Notwithſtanding the text-writers on the common law, and *Fitzherbert* in his *Natura Brevium*, and the Regiſter, have no reference to any common law remedy againſt churchmen committing waſte, yet there is much to be collected now which will give great ſupport to the idea of Sir *Edward Coke*, that there was ſuch a remedy at common law. The firſt thing on which I lay great ſtreſs is, the record to be found in 2 *Roll. Abr.* 813. (*a*), of a proceeding in the caſe of an abbot in the King's patronage, to whom a writ of prohibition is directed, and not only that, but there is a *ſcire facias* to bring him in to appear and anſwer in the Court of *King's Bench* for his defaults. So that there is a formal proceſs in prohibition at the common law under the great ſeal with a *ſcire facias* directed to the ſheriff immediately following the reference to the place where the writ is to be found. That is a record of an earlier date than 35 *Ed.* 1. being dated 3 *Ed.* 1.; and therefore does ſeem to lay a foundation for the concluſion of Sir *Edward Coke*, that the proceedings in 35 *Ed.* 1. had a reference to the courſe of the common law. The reaſoning ſtated in the

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(*a*) Rex vicecomiti ſalutem: Cum ad nos providere pertineat ut Elee-moſina que de Patronatu noſtrorum Predeceſſorum & noſtro fuit, in ſtatu debito abſque vaſto venditione vel deſtructione inde facienda conſervetur: tibi præcipimus quod non permittas quod Abbas de 𝔊. &c. ſui vaſtum venditionem vel deſtructionem faciant de boſcis dominibus hominibus pertinentibus ad Prioratum ſive cellam de 𝔏. quod eſt de Patronatu noſtro & taliter te habere in hac parte ne pro defectu tuo vel Miniſtrorum tuorum ad te nos graviter capere debeamus. Teſte Rege 3 𝔈. 1. Rot. Clauſarum memb. 10. Et la apres un Brief direct. al Vicount quod Scire faciat Abbati de 𝔊. & Priori cellæ ſuæ de 𝔏. quod ſint coram nobis in octabis ut ſuper defectibus, &c. reſpondeant.

the introductory part of the writ, on which it is founded, ſeems to contain fair common law grounds of argument. What is in the King's patronage ought to be preſerved in its proper ſtate without alienation or deſtruction; and this is perfectly conſiſtent with the whole ſyſtem of the common law, which, while it preſerved the immunities of the church, was extremely attentive to the prerogatives of the Crown; whilſt it ſecured the churchman in the fulleſt enjoyment of the poſſeſſions of the church, it looked up with anxious care to the preſervation of the patronage of the King. When therefore I find a record of greater antiquity than the record in Parliament of the 35 *Ed.* 1. grounded on the principles of the common law, I cannot but think that it gives great ſupport to the opinion of Sir *Edward Coke*: and though I am unable to explain how it ſhould have happened that no mention is made by text-writers of ſuch a courſe of proceeding, and though probably Sir *Edward Coke* never ſaw this record of a proceeding in 3 *Ed.* 1. yet I do not complain, or think that there was any thing of haſte or paſſion in the inference which his ſagacity drew from the ſingle record of 35 *Ed.* 1. That record however only authorizes a writ from *Chancery*; Sir *Edward Coke* went further, and ſaid that it might iſſue from the Court of *King's Bench*. When I look for the authority for that part of his propoſition, I do not find it. It ſeems pretty evident that when he firſt mentioned that record in court, he did not perfectly underſtand it, and proceeded on a miſapprehenſion of its contents. He ſays it was agreed in Parliament, that the Court of *King's Bench* ſhould iſſue the writ, and that it was ſo ordered. He could not have ſuppoſed that the Court of *King's Bench* was ordered by Parliament to iſſue the writ, if the King's anſwer had been before him "*Inhibeatur per breve de Cancellariâ.*" He undertakes to ſay that it was actually moved for in the *King's Bench*, and iſſued by that Court; but not vouching his authority, one may conclude that it being ſo antient a record he might have but confuſedly remembered it, and was only following up his firſt miſtake, and conſidering that as done, which, as he believed, was commanded to be done. When that part, therefore, of his propoſition comes to be examined, it may be exceedingly doubtful, whether it be equally well founded with the other. It may be perfectly conſonant to the principles of the common law, that a writ of prohibition to a churchman ſhould iſſue from the *Officina Brevium*, from which all writs of prohibition iſſue, in all caſes at common law. Lord Keeper *Coventry*, it appears in *Roll. Abr.* 813. did

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did afterwards iſſue ſuch a writ, which is a further confirmation of Sir *Edward Coke*'s doctrine to that extent; yet it does not therefore follow that it may alſo iſſue from the *King's Bench*: but when he goes one ſtep further, and ſays that it may be had by any body, his aſſertion ſeems totally unſupported. I do not mean to pronounce that the Court of *King's Bench* could not lawfully iſſue that writ, and that it could not iſſue it on the application of any man; but I do mean to ſay, that I do not perceive the reaſons for its ſo doing. And not perceiving the reaſons, it becomes a very difficult thing for us in this Court by any analogy to follow the Court of *King's Bench*. If the queſtion ſhould ariſe there, they will conſider it, and inform us on what grounds they proceed; but where the grounds of this proceeding at preſent are involved in ſo much obſcurity, ſo little known, ſo little underſtood, can the Court of *Common Pleas* take upon itſelf to do by analogy what has been done by the *King's Bench*?

My Brother *Adair* felt a difficulty as to the *King's Bench* having granted the writ of prohibition in 35 *Edw.* 1. ariſing from the words "*inhibeatur per breve de Cancellariâ.*" He tried to explain it by a reference to a caſe in the Year Book, 38 *H.* 6. 14. That caſe begins, "A prohibition was ſued out of *Chancery*, directed to the Juſtices of the Common Bench to make attachment," *&c.* but the firſt line of that caſe, after all the pains we have taken, remains altogether unintelligible. He ſuppoſed the prohibition might be in ſome manner returnable in the *King's Bench*, and that when it was there, that Court would act upon it. But that proceeding muſt then have been in conſequence of a writ from *Chancery* coming to the *King's Bench*. Taking that to be ſo, though I never ſaw ſuch a writ, or heard of it, except in the Year Book I have alluded to, it will not ſerve the purpoſe of the preſent application, which is an original application for a prohibition in the firſt inſtance to this Court. Here there is no commencement of a ſuit, no writ to us from *Chancery* to give us juriſdiction in the matter. If therefore (though I have no idea that ſuch a writ could iſſue) the difficulty could be reconciled in that way, it would not avail in this caſe.

It is ſaid that there is ſuch a cogent analogy between the proceedings of this Court and the Court of *King's Bench* in prohibition, that if they could lawfully iſſue ſuch a writ, we ought to do ſo likewiſe. Granting that they did iſſue ſuch a writ in the 12 & 13 *Jac.* 1. as it appears from 1 *Bulſt.* and 1 *Rolle*, they did, and that they meant to act on the idea which has been ſtated, I can only conſider thoſe caſes as authorities ſo far as they go. But if the foundation on which they proceeded fails, thoſe caſes will fail alſo: and ſeeing how little has been done upon them in later times, they do not now furniſh that great weight of authority which will juſtify us in acting upon them. I have mentioned that there was another caſe ſubſequent to theſe, in the reign of *Charles* the Firſt, where Lord *Coventry* thought proper to iſſue a prohibition of waſte to a churchman under the great ſeal, on the application of the patron. This I have ſaid affords a further ſupport to the principle of an original remedy at common law, which Sir *Edward Coke*, unaſſiſted by, and indeed contrary to all practice, moſt ſagaciouſly inferred from the 35 *Edw.* 1.; but this does not aid the juriſdiction of the *King's Bench*. As to what the Court of *King's Bench* afterwards conſidered itſelf at liberty to do, in the Lord of *Rutland*'s caſe, 1 *Keb.* 557. that went no further than a rule to ſhew cauſe, and therefore much ſtreſs cannot be laid upon it. The queſtion is, Whether if the *King's Bench* has done right, the *Common Pleas* will alſo do right in following its example? I, who am not prepared to ſay that the *King's Bench* has done right, who ought not to ſay that it has done wrong, becauſe the matter is not before me in a judicial way, cannot, on the ground of analogy, pronounce that the *Common Pleas* would be juſtified in doing what is now required of it. I muſt keep in mind what is ſaid by *Bracton* of this Court, "*ſine warranto juriſdictionem non habet*," and that the expoſition of *warranto*, &c. by Lord *Coke* (*a*) is, "that this Court cannot regularly hold any common plea in any action, real, perſonal, or mixt, but by writ out of the *Chancery*, returnable in this Court." And though he afterwards ſays, by way of exception to the general rule, that this Court, without any writ, "may, upon ſuggeſtion, grant prohibition to keep as well temporal as eccleſiaſtical courts within their bounds and juriſdiction;" yet it ſhould be remembered that the juriſdiction which we do exerciſe in thoſe caſes, is a juriſdiction which was eſtabliſhed after a great deal of ſtruggle and heſitation, even ſo late as the 7 *Jac.* 1. on a reference by the Chancellor to the Judges of the *King's Bench* and *Exchequer*. It is true that their anſwer is reported in general terms; but it is equally true that Lord *Coke* introdues the ſubject when treating of the power of the *Common Pleas* to reſtrain eccleſiaſtical and inferior temporal courts, and therefore the anſwer muſt be underſtood to be confined to that

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(*a*) 4 *Inſt.* 99.

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particular ſpecies of prohibition. The circumſtance which has been inſiſted upon, of this writ being for the King, rather militates againſt the power of this Court. The Crown has its peculiar courts for prerogative proceſs: as the Courts of *King's Bench* and *Exchequer*, or the Court of *Chancery*. But the Court of *Common Pleas* is emphatically a court of pleas between party and party; and though the Crown may elect to proceed here for the maintenance of its civil rights, yet the Court of *Common Pleas* would be going out of its way, if, on the principle of this writ being "for the King," it ſhould upon the ground of any analogy take upon itſelf to do what other Courts have done. In a caſe therefore where there is not practice to ſupport us, where we have not ſtrong lights to guide us, and analogies ſo complete and ſatisfactory as not to admit of being miſtaken, I cannot but think it the ſafeſt courſe for us to decline doing now, what it does not appear that this Court has ever done before. The conſequence is that I think the Court of *Common Pleas* ought not to iſſue this writ of prohibition. Admitting this to be the law, it is unneceſſary for me to enter into the grounds contained in the affidavits. I need not ſay whether this application has been made on mere ſplenetic, or on more worthy motives; nor whether the Lord Biſhop of *Durham*, in this inſtance unintentionally doubtleſs, may not have done that which the law does not ſanction, even though it ſhould turn out clearly that the annual revenues of the ſee have been improved. Moſt certainly it is not to be concluded that, provided an increaſe of the annual revenues of the ſee is obtained, a permanent fund of real property in woods may be utterly deſtroyed. Few who know the Honorable and Right Reverend Prelate, who have been witneſſes to the munificence which he has diſplayed in repairing and beautifying the fabrics of his church, of his caſtles, and his palaces, will ſuſpect him of having intentionally waſted the poſſeſſions of the ſee of *Durham*. At the ſame time it is by no means impoſſible that he, as well as many other churchmen, may unwarily have ſlid into this heavy eccleſiaſtical offence, which all agree to be a cauſe of deprivation, and which may probably be found to be alſo an injury cognizable by ſome of the King's temporal courts. I do not at all regret the expence of time and trouble in this proceeding, ſince I cannot but think it may be productive of very good effects. It may awaken men's minds to the conſideration of this ſort of queſtion, to which, at this time, it is of importance that they ſhould be directed. We have already ſeen one cathedral church almoſt in ruins, and we have ſeen with what expence and exertion both of the clergy and laity that church was reſtored. Had it been in the minds of the clergy and laity for a courſe of years paſt, that the woods of biſhops, and more eſpecially of deans and chapters, including prebendaries, were a ſolid, permanent, and increaſing fund of real property, devolved to them for the ſuſtentation of the cathedrals, the palaces, and houſes of the church, probably that venerable edifice might never have fallen into ſuch ruin, or might have been reſtored with much leſs difficulty. I am afraid that the ſtate of ſome other noble monuments of the fineſt Gothic architecture in this kingdom is not very conſoling; that they are mouldering and crumbling into ruins. I have heard it obſerved with grave and ſerious regret, that no funds have been appropriated for the preſervation of them: perhaps a time will come when that which I take to be an error will be corrected, and when it will be found that all the property of the church is a fund for the ſuſtentation of thoſe fabrics; but that the woods in particular are a ſpecific fund ſo to be employed no man can doubt. I repeat my opinion that the conſequences of this diſcuſſion may be highly beneficial to the public; and though I muſt now ſay that this rule muſt be diſcharged, perhaps hereafter the public will be diſpoſed to acknowledge that the promoter of this application was a friend to the Church of *England*.

HEATH J. Though many points have been properly made in this cauſe, and have been elaborately argued at the Bar, yet I ſhall confine myſelf merely to the diſcuſſion of thoſe which principally affect the queſtion in the view wherein I ſhall conſider it. Previous to the inquiry whether the Biſhop of *Durham* is liable to a prohibition for having felled the trees and grubbed up the woods in queſtion, it muſt be decided whether ſuch prohibition be grantable at the inſtance of *Jefferſon*, a ſtranger, who is in nowiſe connected with this tranſaction in point of intereſt or otherwiſe. A prohibition for waſte was certainly a common law remedy; it was therefore grantable at the inſtance of the party injured, and of no other perſon whatever. In ancient times it probably commenced in an original writ iſſuing out of *Chancery*; afterwards the Court itſelf granted it on a fiction that an original writ had iſſued. In the books there are ſome looſe *dicta* that an act of parliament and the common law ſhould reſpectively ſtand as originals according to the circumſtances of the caſe; but this is not law, unleſs it be confined to prohibitions for exceſs of juriſdiction, and to reſtrain waſte. Recourſe has been had to reaſoning by analogy from the caſes of rectors; but no caſe has been cited, no precedent has been produced of a prohibition againſt a parſon to ſtay waſte in felling trees that was not granted at the ſuit of the patron or church-wardens. The report of *Knowle* v. *Harvey* is very looſe and inaccurate; it is not ſtated on whoſe ſuggeſtion the prohibition was granted; probably it was at the inſtance of a party intereſted. The ſame obſervation will apply to *Coſtard*'s caſe, 2 *Roll.* 111. In *Sacket*'s caſe, 3 *Bulſt.* the prohibition was granted *pendente lite*. There being therefore no inſtance of a prohibition granted in any analogous caſe, it remains to examine the caſe of the Biſhop of *Durham*, 35 *Ed.* 1. I ſhall take my Lord *Coke*'s own report of this proceeding "by which it appears," ſays he, 11 *Co.* 49. *Liford*'s caſe, "that the Parliament referred him to the ordinary remedy of prohibition at common law." It does not appear even in this caſe who were the petitioners in Parliament. It might be at the inſtance of the biſhop's own tenants who had common of eſtovers in his woods. The commons made the application; for the commons were the great inqueſt of the nation. Cutting down the woods at that time was no ſmall grievance, when the uſe of foſſile coals was not common. According to ſeveral books, it was ſaid by Lord *Coke* that a prohibition was afterwards granted in the *King's Bench*; though it is not expreſſed whether, on the application of the King, the tenants of the biſhop, or any other perſon injured by the ſpoil and waſte. It is however obſervable that from the 35 *Ed.* 1. to the time of Lord *Coke* the precedent was never followed in a ſingle inſtance. This appears by the avowal of the Chief Juſtice himſelf, for he is made to ſay 2 *Bulſt.* 279. "We will *revive* this again." In the Year Books 2 *H.* 4. cited at the Bar by the counſel who ſhewed cauſe, it is ſaid by *Thirning* Ch. J. that if a biſhop or archdeacon ſhall cut down all his wood, he ſhall not be puniſhed at common law: but this muſt be underſtood according to the ſubject-matter, that they ſhall not be ſubject to an action of waſte.—*Thirning* ſays he ſhall not be puniſhed by the patron, nor by any other way. It does not follow that a prohibition will not lie at the inſtance of a party injured, becauſe a prohibition is not a procedure for puniſhment originally, though it might follow in the caſe of a contempt of the prohibition. The opinion of *Thirning* was extrajudicial; it may however ſerve to ſhew the current opinion of the day. It remains to be conſidered whether the circumſtance of the King being intereſted will furniſh a ground for the prohibition. This idea is founded on a *dictum* of Lord *Coke*, reported to have been uttered on a different occaſion, and principally referred to in 1 *Roll.* 335. "Any perſon may have this writ againſt him, (meaning *Sacker*,) for it is the *King's writ*," and the prohibition was not to waſte. By the King's writ he muſt be underſtood to mean a prerogative writ, for every writ is the King's writ. Does then this doctrine hold with reſpect to the other prerogative writs? It is not applicable to the writ of *mandamus* in the Court of *King's Bench*, or to the writ of *ne exeat regno* in a Court of Equity. Thoſe writs are only grantable at the inſtance of ſome party intereſted. The writ of *habeas corpus* from neceſſity can only be applied for on behalf of the party intereſted. Admitting that a ſubject cannot ſue an original writ in the King's name, the inference is, that he could not ſue an original writ iſſuing out of the Court of *Chancery*; and if ſo, it goes a great way to prove that he is not entitled to a prohibition in this Court, which preſumes a writ of prohibition iſſuing out of the Court of *Chancery*. Add to this, that this is a prohibition of a ſingular nature, inaſmuch as it is founded on a ſuggeſtion, and applied for merely on affidavit. After all, what reliance can there be had on theſe *dicta* of Lord *Coke* under all the circumſtances attending them? They were not the reſult of a calm diſpaſſionate inquiry: that great lawyer was much heated in the controverſy between the Courts at *Weſtminſter* and the Eccleſiaſtical Courts. In every part of his conduct his paſſions influenced his judgment. *Vir acer et vehemens*. His law was continually warped by the different ſituations in which he found himſelf. There is leſs reaſon for granting this prohibition, becauſe it is not the only remedy: the Crown has its officers, whoſe duty it is to watch over its intereſts: the metropolitan may proceed againſt the biſhop for dilapidation: the officers of the Crown and the metropolitan may exerciſe their diſcretion, and are competent to decide whether this ſuppoſed melioration be really one or not. But we are bound by the ſtrict rules of law, and cannot decide upon the propriety of the biſhop's conduct, but only whether in ſtrictneſs it amounts to waſte. However, I do not found my opinion on the exerciſe of a diſcretionary power reſiding in the Court, but that neither on principle nor on precedent are we warranted in granting this prohibition at the inſtance of a ſtranger.

ROOKE J. I am of the ſame opinion. The queſtion with reſpect to the power of the Court has been already ſo completely

exhauſted,

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exhauſted, that there is nothing for me to add. Something however has been ſaid in the courſe of the argument, as to the right of biſhops to deſtroy the woods which are the property of the church, on which I think it neceſſary to make ſome obſervation. I conſider the biſhop as having to certain purpoſes a fee-ſimple in his biſhopric. But he is ſeiſed to a ſpecial intent, as a public officer for public truſts. If before the reſtraining ſtatute he had alienated the property of the ſee, he would have been guilty of a groſs breach of truſt, and I conceive there was a remedy at common law. As a general principle it is waſte to deſtroy woods. But theſe great officers have duties annexed to their ſtation; as the repairs of the palaces, bridges, and manſion-houſes of the ſee; and they would not exceed the limits of their duty if they applied the woods to the repair of their cathedrals. If through the forbearance of their predeceſſors, the woods belonging to the church are in ſuch a ſtate that it is adviſable to cut them down, this may be done, very beneficially for the ſee, by cutting only a part one year and a part another, and at the ſame time planting ſo as to create a renewal of this kind of property. But it may be doubted whether a biſhop can *grub up* the woods at all without the licence of Parliament. At any rate, however, I am clear that this court has no juriſdiction in the preſent caſe.

Rule diſcharged.

Nov. 21ſt.

CHAPMAN v. SNOW.

A defendant by perfecting bail above, waves all objections to the ſufficiency of the affidavit on which he was held to bail.

RUNNINGTON Serjt. on the 18th *November* obtained a rule to ſhew cauſe, why an *exoneretur* ſhould not be entered on the bail-piece and a common appearance allowed; the affidavit of debt having omitted to negative a tender in bank notes according to the directions of 37 *G.* 3. *c.* 45. *ſ.* 9. (*a*)

(*a*) In *Stewart* v. *Smith*, a ſimilar rule having been obtained, *Shepherd* Serjt. this day ſhewed cauſe, and ſtated that the affidavit was made in *Ireland* only two days after the paſſing of the act.

HEATH and ROOKE J^s^. (abſente *Eyre* Ch. J.) ſaid, that though it was a hard caſe, they could do nothing, for the act was poſitive. Vid. *Neſbitt* v. *Pym*, 7 *T. R.* 376. note (*c*).

Shepherd then applied for leave to file a ſupplemental affidavit. *Sed per Curiam*—We have conferred with the Judges on the conſtruction of this act, and think that a ſupplemental affidavit cannot be allowed.

Rule abſolute.

The arreſt took place on the 5th of *Auguſt:* the Defendant had put in and perfected bail above, and a plea had been demanded.

Le Blanc Serjt. ſhewed cauſe: and contended that the Defendant had waved any irregularity in the affidavit: 1ſt, By putting in bail above; 2d, By delaying to apply to the Court till the 18th *November*, twelve days after the commencement of the term (*a*).

Runnington in ſupport of the rule. It was impoſſible for the Defendant to make this application, till he was regularly in court, which he was not till he had put in and perfected bail.

HEATH and **ROOKE** Js. (abſente *Eyre* Ch. J.) held that the Defendant had waved the irregularity, and

Diſcharged the rule (*b*).

EYRE Ch. J. on the next day ſaid, My Brothers have mentioned to me a rule for entering an *exoneretur* on the bail-piece, and allowing a common appearance, which was yeſterday diſcharged, and I think properly diſcharged. The Defendant is not now in cuſtody, he has put in bail, and is therefore too late to make this application. If he were to be allowed to move now, I do not ſee why he ſhould not be at liberty to move after proceedings commenced againſt the bail. Perhaps the Plaintiff has proceeded againſt them, and is very near judgment; for any thing that I know, he may have got judgment. Where then is the Court to ſtop? Here the proceſs is bad: the party does not come in the firſt inſtance, but does a voluntary act by perfecting ſpecial bail: the cauſe goes on with a total diſregard to what has paſſed; the bail to the ſheriff are diſcharged, and the whole of that proceeding is gone. Shall the Defendant now be allowed to apply to us to diſcharge the ſpecial bail, and introduce common bail in their place? I think that he ſhould not be heard.

(*a*) Vid. 7 *T. R.* 376. *n.* (*a*), *Fenwick* v. *Hunt*, where length of time was holden by the Court of *K. B.* to be no waiver of the objection.

(*b*) Vid. *Goodwin q. t. Parry*, 4 *T. R.* 577. *Huſſey* v. *Wilſon*, 5 *T. R.* 254. *Morgan* v. *Johnſon*, 1 *H. Bl.* 628. *Norton* v. *Butler Danvers*, 7 *T. R.* 375. and *Levy* v. *Daponte*, *ibid.* *n.* (*a*).

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If a Plaintiff become bankrupt after a nonſuit at niſi prius, and before the judgment of nonſuit, the coſts of the nonſuit are a debt proveable under the commiſſion.

SHEPHERD Serjt. obtained a rule to ſhew cauſe why the writ of *capias ad ſatisfaciendum* iſſued and executed on the judgment of nonſuit in this cauſe ſhould not be ſet aſide, and why the ſum of 24 *l.* 2 *s.* 6 *d.* levied thereon and paid into the hands of the ſheriff of the county of *Middleſex*, ſhould not be reſtored to the Plaintiff, he having obtained his certificate; and cited *Hurſt* v. *Mead*, 5 *T. R.* 365.

The Plaintiff was nonſuited in an action againſt the Defendant at the Sittings after *Hilary* term 1797; on the 26th of *April* following a commiſſion of bankrupt iſſued againſt the Plaintiff, and on the 7th of *May*, being the fourth day of *Eaſter* term, coſts were taxed, and the judgment of nonſuit afterwards ſigned; on the 30th of *June* in the ſame year the Plaintiff obtained his certificate, and on the 5th of *Auguſt* following the Defendant ſued out a *ca. ſa.* under which the ſheriff levied the abovementioned 24 *l.* 2 *s.* 6 *d.*

Adair Serjt. for the Defendant. It was uniformly holden till the caſe in 5 *T. R.* 365. that coſts of this deſcription not converted into a debt by judgment, or liquidated by taxation, could not be proved under the commiſſion. In 3 *Wilſ.* 272. the caſe of *Walter* v. *Sherlock*, *Hil.* 23 *Geo.* 2. is cited, where in an action of aſſault and battery before bankruptcy of the Defendant, and verdict for the Plaintiff with damages during his bankruptcy, but no judgment till after certificate, the Court held the debt not proveable under the commiſſion, as not due at the time of the bankruptcy. So in *ex parte Sneeps*, *Cooke's B. Laws* 152. where coſts were taxed ſubſequent to the bankruptcy, but the order for the taxation was made before it, the Chancellor held that the *taxation* conſtituted the demand. The caſe of *Blandford* v. *Foote*, *Cowp.* 138. though apparently againſt the Defendant, does in fact contain a ſtrong implication in his favour; for though the bankrupt was there diſcharged, yet the reaſon given was that the original debt being clearly due before the bankruptcy, the intereſt and coſts which had accrued ſince ſhould ſtand on the ſame foundation. But in the preſent caſe there is no original debt to which a reference can be made: there is no damage and no demand, till the coſts are taxed, and the judgment of nonſuit ſigned. The ſame obſervation applies to the caſe of *Lewis* v. *Piercy*, 1 *H. Bl.* 29. as to that of *Blandford* v. *Foote*. So in *ex parte Todd*, cited in *Goddard* and *Vanderheyden*, 3 *Wilſ.* 270. where the Defendant became bankrupt after a verdict in ejectment againſt him with nominal damages, and the Plaintiff ſigned judgment in the following term, and had coſts *de incremento* taxed and allowed, Lord Chancellor *Henley* held that the coſts did not become a debt till the judgment. This current of authorities is too ſtrong to be ſhaken by the ſingle authority of *Hurſt* v. *Mead*, which appears to have been a haſty deciſion, as cauſe was ſhewn in the firſt inſtance.

Shepherd, in ſupport of the rule, relied on the caſe of *Hurſt* v. *Mead*, and ſaid that *Buller* J. had there alluded to a ſimilar caſe in the Court of *Common Pleas*, where the point was ruled the ſame way: but admitted, that he had not been able to find any other than that of *Lewis* v. *Piercy*.

EYRE Ch. J. The ground of the deciſion in *Lewis* v. *Piercy* muſt have been that there was an actual debt which exiſted before the bankruptcy, and though not converted into a judgment might have been proved under the commiſſion independent of the action; and being ſo proveable, the ſubſequent proceedings might be conſidered as incident, and as nothing when ſeparated from the ſubject to which they were incident. I would go as far as I could towards relieving the bankrupt, and if it could be made out that the ſubſtance of the debt were conſtituted by the nonſuit, and nothing more than the mere taxation were neceſſary to reduce it into a practical ſhape, in which it might be recovered, it might then be conſidered in the ſame manner as if the taxation were made on the very day of the verdict given: but if a nonſuit at *niſi prius* be only a ground on which the Court is to pronounce judgment, then the judgment being that which conſtitutes the debt, and being after the bankruptcy, I do not know how to refer the debt to the time of the nonſuit. There ſeems to be only an inchoate intereſt ariſing on the nonſuit at *niſi prius*; you could not tax the coſts till after the day in Court, and the *poſtea* returned: the nonſuit alone is nothing, abſolutely nothing. When the record is returned into Court, the Court is to deal with it, and to pronounce the judgment of the law upon it; upon which the coſts attach; but in order to make the judgment complete, the coſts are firſt taxed. The coſts are given with reference

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to the judgment of nonſuit, and not to the nonſuit at *niſi prius*, and therefore, as at preſent adviſed, I cannot agree to the caſe of *Hurſt* v. *Mead.* The nonſuit at *niſi prius* was not that which gave any ſpecific demand, proveable under the commiſſion; for the debt was wholly unliquidated till the moment that the Court had pronounced judgment.

HEATH J. I do not ſee how any poſſible reference can be made to the time of the nonſuit at *niſi prius:* but after judgment had, the debt ariſing from the coſts *tranſit in rem judicatam* by virtue of the act of Parliament.

ROOKE J. This is one of many caſes which bears hard upon the bankrupt. I ſhould be glad to ſupport the judgment in the *King's Bench*, and relieve the bankrupt, if it could be done conſiſtently with the rules of law. But, as at preſent adviſed, I think the authorities the other way too ſtrong.

The Court having deſired the counſel to make inquiry into the circumſtances of the caſe of *Hurſt* v. *Mead*,

Shepherd on this day ſaid, that by the rule and original affidavit in that caſe which he had obtained, it appeared to have been an application to diſcharge the bankrupt out of execution, on a *ca. ſa.* for the coſts of a judgment of nonſuit.

EYRE Ch. J. Thus much is certain that the nonſuit at *niſi prius* is that which neceſſarily produced the judgment of nonſuit. It will be difficult to diſtinguiſh this caſe from a caſe (*a*) where an action of ſlander was brought, and damages given by the jury, and before the day in bank, a commiſſion of bankrupt iſſued againſt the Defendant, who on this ground was diſcharged out of execution. There was no original debt previous to the verdict in that caſe any more than before the nonſuit at *niſi prius*, in the caſe of *Hurſt* v. *Mead.* I do not think either of the caſes founded on principle. But the queſtion is, Whether we ought not to adhere to a decided caſe rather than contradict it, where the demand is ſuch as the Court cannot look upon with favour? On this ground we are of opinion that we muſt make

The rule abſolute.

(*a*) *Longford* v. *Ellis*, cit. 1 *H. Bl.* 29. *n.*

JOHN NORMAN CROSS Demandant, WILLIAM GREY Tenant, and ANNE PEAD and Another Vouchees.

Nov. 22d.

The Court will give leave to amend a miſtake in the writ of entry in a common recovery.

CLAYTON Serjt. on a former day moved to amend the writ of entry, *mittimus*, tranſcript, and recovery, in this caſe. The premiſes, as deſcribed in the deed to lead the uſes, amounted, on being added together, to one hundred and ſixty-eight acres two roods fifteen poles: in the recovery the parcels were deſcribed to be two meſſuages, thirty acres of land, thirty acres of meadow, and thirty acres of paſture, whereas the recovery was intended to be ſuffered of two meſſuages, fifty acres of land, fifty acres of meadow, and fifty acres of paſture: the miſtake was ſuppoſed to have originated with the clerk in the country writing the figures 30 inſtead of 50; the parties were all alive.

It was urged that no inconvenience would ariſe from this amendment, provided that the increaſed fine for alienation were duly paid.

The Court directed the parties to apply, in the firſt inſtance, to the Alienation Office, and mention the matter again when that was done.

Accordingly it was afterwards brought on again by *Clayton*, who ſtated that an application had been made at the Alienation Office, where the practice was to rate a new fine for King's ſilver, on the whole number of acres, and then make allowance for the money received before, and that there was a precedent in the office of a manor having been added on a ſimilar motion.

But the Chief Juſtice intimating his recollection of a reſolution in the Houſe of Lords, that no original writ could be amended, and wiſhing to conſider to what length the practice of amendments had gone ſince that time, the caſe ſtood over till this day, when being again moved,

EYRE Ch. J. I heſitate about granting this motion, becauſe I find a caſe in the Houſe of Lords, where, on a reference to Lord *Holt* and the Judges, it was determined that a miſtake in a writ of entry could not be amended either by common law or by ſtatute. It is the caſe of Lord *Pembroke*, 1 *Salk.* 52. The practice I underſtand to be in favour of the amendment. My only difficulty ariſes from the caſe I have mentioned; but if my Brothers are ſatisfied I ſhall not oppoſe the amendment.

Heath J. By *Gage's* caſe (*a*), 5 *Rep.* 45. and ſeveral caſes to be found at the end of *Piggott* (*b*), amendments of common recoveries are warranted; and during twenty-two years that I have ſat here, it has been the conſtant practice to amend them by the deed to lead the uſes.

Rooke J. By the 8 *H.* 6. *c.* 12. original writs may be amended as to miſtakes of the clerks. There is a caſe in *Blackſtone* (*c*) alſo, where it was held that if a clerk miſtake his inſtructions the *præcipe* ſhall be amended.

Leave was given to amend (*d*).

(*a*) In 1 *Salk.* 53. and *Forteſcue*, 188. *Gage's* caſe is ſaid to be miſreported, and not law.

(*b*) *Drake* and another v. *Biddulph*, p. 222. *Skinner* and others v. *Land*, p. 228.

(*c*) Vid. *Watſon* v. *Cox*, and *Henzel* v. *Lodge*, 2 *Bl.* 747 and 1065. alſo 3 *Wilſ.* 154.

(*d*) Vid. 2 *Barnes*, 24 and 216. and *Jenkinſon* v. *Staples*, *Cruiſe*, 2 vol. p. 183. where the *præcipe* and writ of entry in a common recovery were amended.—Alſo *Arthur Blackamor's* caſe, 8 *Co.* 156. 163.

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Victoire Adélaide Françoise Melan *v.* The Duke de Fitzjames.

If a defendant be held to bail in this country on an inſtrument entered into in *France*, and by which inſtrument his property only and not his perſon, was according to the law of *France* made liable, the Court on motion will diſcharge him on his entering a common appearance.

A Rule had been obtained by *Shepherd* Serjt. calling on the Plaintiff to ſhew cauſe why the bail-bond given for the appearance of the Defendant in this cauſe ſhould not be delivered up to be cancelled, on the Defendant entering a common appearance.

The affidavit of debt ſtated, "That the Defendant was juſtly and truly indebted to the deponent in the ſum of 1000 *l.* and upwards (*a*) on a certain deed, under the hand and ſeal of the Defendant, bearing date the 22d *January* 1789, made and executed in *France*, according to the laws there in force, to and in favour of the deponent."

By the inſtrument in queſtion, the Defendant "creates, conſtitutes, promiſes, ſecures, and grants to the Plaintiff the ſum of 30,000 livres, by way of yearly annuity, &c. which ſum the Defendant promiſes and binds himſelf to pay to the Plaintiff, at his houſe, or to the bearer of this preſent deed, in four equal payments, at the four uſual periods of the com-

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(*a*) When this was firſt moved, the Court doubted whether the words "on a certain deed" were a ſufficient deſcription of the debt, to hold the Defendant to bail. But this objection was never mentioned again.

mon year, *&c.* authorizing the Plaintiff to take and levy the ſaid annuity ſeverally upon the property, goods, moveables and immoveables, at preſent or hereafter to be in poſſeſſion of the Defendant; who for the better ſecuring the payment of the ſaid annuity, mortgages and renders reſponſible the whole of the ſaid property, goods, *&c.* as above ſtated. This inſtrument to bear the intereſt of 10 *per cent.* according to law, *&c.* the Defendant promiſing and binding himſelf to fulfil the tenor of this deed, under penalty and mortgage of all his property, goods, moveables and immoveables, now or hereafter to be in his poſſeſſion, and which he ſubmits for that purpoſe to the reſtraint of juriſdiction of the Court of Ghatelet at *Paris*, and fully renouncing every thing which may be contrary or injurious to theſe preſents," *&c.*

An affidavit of a *M. D'Outrement* was alſo produced, ſtating, "That the deponent had been a counſellor of the Parliament of *Paris* during twenty-five years, and in that character was ſkilled in the laws of *France*: and that by the laws of *France*, and particularly by the 6th article of the 34th title of the Ordinance or Law of 1667, which was in full force when the ſaid deed was made, not only the perſon of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting to ſtipulate that his body ſhould be arreſted or impriſoned by reaſon of a deed of that ſort; and that the only caſe where a perſon could be arreſted or impriſoned by the laws of *France* for debt, was upon a bill of exchange, or a commercial engagement; and that in every other caſe the property only was liable to be ſeized."

Adair Serjt. now ſhewed cauſe. This rule was granted in order to aſcertain whether the ſecurity in queſtion was that kind of ſecurity which imported a remedy againſt the perſon of the Defendant, or whether it was only in the nature of a mortgage on his eſtate. If this be a mere ſecurity, affecting the land and perſonal property only of the Defendant, and if it ſo appears on the face of it, the Court will attend to that circumſtance. But if I can ſhew that it is a perſonal ſecurity affecting the perſon and following it every where, whatever may be the law of *France* as to the form of proceeding, yet when the party is found in this or any other country, he may be proceeded againſt according to the rules and practice of the country in which he is reſident. The inſtrument was given for a ſubſiſting debt, and may be called a bond. By it the Defendant binds, firſt, himſelf, and then his property.

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It is therefore in fact a double ſecurity. 1ſt, It is a perſonal ſecurity by which the perſon is charged. 2dly, It is a charge on the property real and perſonal of the Defendant. And yet it is contended, that though it has a double aſpect it extends only to the property, and not to the perſon. Indeed the property, which is the ſubject of this mortgage, being in another country, and ſubject to the laws of that country only, the ſole remedy which the Plaintiff now has is againſt the perſon of the Defendant.

Shepherd in ſupport of the rule. The affidavit of *M. D'Outrement* is confirmed by the comment on the Ordinance of 1667, to be found in the poſthumous works of *M. Pothier*, quarto edit. vol. 7. *Cinquieme Partie*, chap. 1. "*De la Contrainte par Corps*," from p. 278 to p. 285.; where it is laid down, that all conſtraint of the perſon, even after judgment, on all contracts, (except thoſe which are there ſpecified, and amongſt which ſuch a contract as the preſent is not included,) was taken away by the law of 1667. This motion is not made on the ground of privilege; in that caſe the law of *England* would proceed according to its own rules. But if the contract was entered into with reference to the laws of *France*, it is the ſame thing as if thoſe laws were expreſsly ſtated on the inſtrument. So if a bond is made in *France*, payable in *England*, being made with a view to the law of *England*, that law muſt prevail, *Robinſon* v. *Bland*, *Burr*. 1077. In *Talleyrand* v. *Boulanger*, 3 *Vezey* jun. 447. the circumſtances were much of the ſame nature as in the preſent caſe. It was ſtated in argument, that the Court of *Common Pleas* had diſcharged a Defendant on common bail, becauſe his perſon would not have been liable by the law of *France* (*a*). And the Lord Chancellor ſaid, "It would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place;" and added, "that he had no doubt that a court of law would upon ſuch grounds diſcharge a Defendant, upon common bail."

EYRE Ch. J. In caſes originating in this country, and wholly governed by the laws of this country, this Court rarely interferes in a ſummary manner to diſcharge a party on a common appearance, provided the affidavit of debt is conceived in poſitive terms; nor will the Court do it in any caſe unleſs it ſees diſtinctly that an ill uſe has been made of the power of holding to bail. It has

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(*a*) *Shepherd* admitted that he had not been able to find any account of ſuch a caſe in this court.

been very often repeated, and I wiſh it were more clearly underſtood, that the Court does not mean to try the queſtion between the parties on theſe preliminary motions. But it is a very different caſe when the ground of the debt is a tranſaction in a foreign country. It does not then originate in our law, but in the law of that country which creates the obligation. That law muſt be laid before us by evidence; ſince we do not take notice of it of courſe. When it is ſworn that a party is indebted on a bond or a promiſſory note, we know what the nature of thoſe inſtruments is, and the law concerning them; or if for goods ſold and delivered, we know that goods ſold and delivered may create ſuch a debt. But if the plaintiff ſwear poſitively to a debt in this country, and refer to ſomething which renders it ambiguous whether there be a debt or not, the party ought not to be held to bail. Suppoſe he were to refer to ſome contract which had the appearance of being equivalent to a bond, and the Defendant were to ſhew that it raiſed a demand for damages unliquidated; I think the Court would ſay, the Defendant may be held to bail upon a ſpecial order, but not by the mere force of the affidavit. Apply this reaſoning to the caſe before us. The Defendant is held to bail on a contract made in *France*, the nature of which we muſt learn, not from the face of the inſtrument, but from evidence. There is no reference in it to the laws of this country. It muſt therefore be ſhewn what the laws of *France* are, and that they create an obligation which the laws of *England* will enforce. What would be a defence there, will be a defence here. The whole therefore turns on the laws of a foreign country. No general rule can be laid down; for whether there be a debt or not does not come within our knowledge, nor indeed that of the party himſelf, who may be miſtaken with reſpect to the law. I do not know that we have ever done what is now deſired of us before; but if it appears that this contract creates no perſonal obligation, and that it could not be ſued as ſuch by the laws of *France*, (on the principle of preventing arreſts ſo vexatious as to be an abuſe of the proceſs of the Court) there ſeems to be fair ground on which the Court may interpoſe to prevent a proceeding ſo oppreſſive as a perſonal arreſt in a foreign country, at the commencement of a ſuit, in a caſe which, as far as we can judge at preſent, authorizes no proceeding againſt the perſon in the country in which the tranſaction paſſed. If there could be none in *France*, in my opinion there can be none here. I cannot conceive that

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what is no perſonal obligation in the country in which it ariſes can ever be raiſed into a perſonal obligation by the laws of another. If it be a perſonal obligation there, it muſt be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is muſt be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it.

HEATH J. I wiſh I could concur in opinion with my Lord; for I think this a very hard caſe. This affidavit ſwears as ſtrictly as poſſible to a debt due on a written contract. It being a foreign contract the party has been called upon to produce it, and ſhew of what nature it is, before we allow the Defendant to be held to bail. Now this, on conſideration, does ſeem to me to be a perſonal contract, and if it be ſo, I have not the leaſt doubt that the Defendant ſhould be held to bail. That being the caſe, we all agree, that in *conſtruing* contracts, we muſt be governed by the laws of the country in which they are made; for all contracts have a reference to ſuch laws. But when we come to remedies it is another thing, they muſt be purſued by the means which the law points out where the party reſides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode, of enforcing it. Whoever comes into a country voluntarily ſubjects himſelf to all the laws of that country, and therein to all the remedies directed by thoſe laws, on his particular engagements. If an *Iriſh* peer comes over to this country, he may be arreſted on a contract entered into in *Ireland*, though his privilege would have protected him in that country. It would be hard if it were otherwiſe, ſince the advantage would not be mutual between the contracting parties. Suppoſe the Duke *de Fitzjames* might have been arreſted by the law of *France*, and that he could not by our law, in that caſe he would have had the advantage; as it is, the Plaintiff has obtained an advantage, and ought not to be deprived of it. I ſhall be glad, however, if my Brother *Rooke* ſhall agree in opinion with my Lord, ſince it is a caſe which deſerves compaſſion.

ROOKE J. I entirely agree with my Lord Chief Juſtice. Though the contract, on the face of it, may ſeem to bind the perſon of the Duke *de Fitzjames*, by the words, "binding himſelf," &c. yet being made abroad, we muſt conſider how it would be underſtood in the country where it was made. According to the affidavit which has been produced on one ſide, and not contradicted by the other, this contract is conſidered in *France* as not affecting the perſon. Then what does it amount to? It is a contract that the Duke's eſtate ſhall be liable to anſwer the demand, but not his perſon. If the law of *France* has ſaid that the perſon ſhall not be liable on ſuch a contract, it is the ſame as if the law of *France* had been expreſsly inſerted in the contract. If it had been ſpecially agreed between the parties not to conſider the Duke's perſon liable, and under thoſe circumſtances he had come over here, there would have been no difference between us; for if it were *agreed* there that the perſon ſhould not be liable, it would not be liable here. Now as far as I can underſtand the contract, this is the true meaning of it. The defendant is not bound by the mere words of the contract, but has a right to explain by affidavit how it would be conſidered in *France*. With the explanation given I am ſatisfied, and being ſatisfied with it, I think the Defendant ſhould be permitted to enter a common appearance.

Rule abſolute.

HUTCHINS *v.* HESKETH.

Nov. 23d.

If a priſoner brought up to be diſcharged under ſ. 16. of the Lords' act, deliver in a falſe ſchedule and is remanded, the Court will not at the inſtance of a creditor, even with the priſoner's conſent, order him to be brought up a ſecond time, for the purpoſe of amending his ſchedule and aſſigning over that property which he had before concealed.

THE Defendant, a priſoner in the *Fleet*, had formerly applied to the Court to be diſcharged under the Lords' act (*a*), and accordingly at that time delivered into Court a paper by way of ſchedule, ſtating that he was poſſeſſed of no property; on which he was remanded, the Plaintiff undertaking to pay him his groats. The Plaintiff having ſince diſcovered that the Defendant had ſome property at the period of his former application,

Clayton Serjt. moved the Court to have him brought up under ſ. 16. of the above act, in order that he might be compelled to aſſign over ſuch property.

EYRE Ch. J. I am not prepared at preſent to direct the priſoner to be brought up and have a new oath tendered to him, by which, if he takes it, he muſt be convicted of perjury.

ROOKE J. I think we cannot make this order.

Clayton, having been deſired by the Court to look into this matter, this day mentioned, that he now had the conſent of the priſoner

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(*a*) 32 *Geo.* 2. *c.* 28.

ſoner to aſſign his effects by amending his ſchedule, and moved that he might be brought up for that purpoſe.

Sed per Eyre Ch. J. This motion is not made on any affidavit, ſtating any miſapprehenſion on the part of the priſoner at the time of delivering in his ſchedule. What reaſon then is there for our doing what is deſired of us? If a man in the ſituation of the Defendant had made a miſtake, the Court would go as far as poſſible to aſſiſt him. But this is not that caſe. This is a detected man who has dared to give in a ſchedule as the ſchedule of a man without effects, when he really had effects. Here *we* are without apology for allowing him to amend his ſchedule. Should we aſſiſt him in his attempt to avoid thoſe heavy penalties which are impoſed by the act on perſons who have conducted themſelves in this way? He may poſſibly eſcape thoſe penalties for aught I know, but it muſt not be by any act of this Court. Nor is it neceſſary for the ſake of the creditor that we ſhould interpoſe. If the Defendant really has ſuch effects as the Plaintiff ſuppoſes, he may procure a title to them without coming to this Court. We ſhall not, after what has paſſed, order the priſoner to be brought up on this ſuggeſtion.

Clayton Serjt. took nothing by his motion.

Nov. 25th.

Sir B. Hammett, Knt. and Others *v.* Sir W. Yea, Bart.

A. being a banker in the country, diſcounts bills at four months for *B.* and takes the whole intereſt for the time they have to run; *B.* on being aſked how he will have the money, directs part to be carried to his account, part to be paid in caſh, and part by bills on *London*, ſome at three, ſome at ſeven, and ſome at 30 days ſight; and held not to be an uſurious tranſaction, ſo as to induce the Court to grant a new trial, ſince the ſurplus of intereſt taken by *A.* might be referable to the expences of remittance.

Debt on bond for 25,200 *l.*

Pleas.—1ſt, *Non eſt factum*; 2d, 3d, and 4th, Uſury in the manner of diſcounting a promiſſory note for 1800 *l.* dated the 13th of *Auguſt* 1795, and payable four months after date. 5th and 6th, Uſury in the manner of diſcounting a promiſſory note for 3000 *l.* dated the 25th *Auguſt* 1795, and payable four months after date. 7th and 8th, Uſury in the manner of diſcounting a promiſſory note for 2300 *l.* dated the 17th *Sept.* 1795, and payable four months after date: Each of the ſeven laſt pleas averring that the bond in queſtion was given to ſecure to the plaintiffs (among other ſums of money) the payment of the promiſſory note to which it related.

Replication. Iſſue joined on the firſt plea. To the ſeven laſt, "that it was not corruptly and againſt the ſtatute, &c. agreed,

&c.

&c. as the ſaid defendant hath in that behalf alleged;" tendering iſſue (*a*).

Rejoinder.

(*a*) The ſpecial pleas, which were drawn and ſettled with much conſideration, were as follow:

1ſt, That after the 29th day of *September* A. D. 1714, and before the making of the ſaid writing obligatory, to wit, on the 14th day of *Auguſt*, A. D. 1795, at, *&c.* the ſaid *J. H.* was poſſeſſed of and intereſted in a certain note in writing, commonly called a promiſſory note, bearing date the 13th day of *Auguſt* in the ſaid year of our Lord 1795, made and ſubſcribed by the ſaid *J. H.*, whereby the ſaid *J. H.* four months after date promiſed to pay to the ſaid Sir *William Yea* or order 1800*l.* value received. And the ſaid Sir *W.* afterwards, to wit, on, *&c.* at, *&c.* indorſed the ſaid promiſſory note; his own hand being thereunto ſubſcribed, and delivered the ſaid promiſſory note ſo indorſed to the ſaid *J. H.* and the ſaid promiſſory note being ſo made and indorſed, and the ſaid *J. H.* being ſo poſſeſſed thereof as aforeſaid, after the 29th day of *September* A. D. 1714, and before the making of the ſaid writing obligatory, to wit, on, *&c.* at, *&c.* it was corruptly and againſt the ſtatute made in ſuch caſe agreed between the ſaid Plaintiffs, then and there being bankers and partners, and carrying on the buſineſs of bankers in partnerſhip, and the ſaid *J. H.* that the ſaid Plaintiffs ſhould lend to the ſaid *J. H.* 1770*l.* in manner following; (that is to ſay,) that the ſaid Plaintiffs, on the ſaid 14th day of *Auguſt* in the ſaid year of our Lord 1795, at *Taunton* in the county of *Somerſet*, to wit, at *London* aforeſaid, in the pariſh and ward aforeſaid, ſhould deliver to the ſaid *J. H.* a certain bill of exchange in writing, drawn by them the ſaid Plaintiffs on certain perſons trading under the ſtile and firm of Sir *James Eſdaile* and Co. for 500*l.* payable three days after ſight of that bill of exchange; and alſo a certain other bill of exchange in writing, drawn by them the ſaid Plaintiffs upon the ſaid perſons trading under the ſtile and firm of Sir *James Eſdaile* and Co. for other 500*l.* payable ſeven days after ſight of the ſaid laſt mentioned bill of exchange; and that the Plaintiffs then and there, to wit, on, *&c.* at, *&c.* ſhould lend and advance to the ſaid *J. H.* other 470*l.* and ſhould give credit to the ſaid *J. H.* for other 300*l.* in account between them the ſaid Plaintiffs, as ſuch bankers and partners as aforeſaid and the ſaid *J. H.*; and that they the ſaid Plaintiffs then and there, to wit, on, *&c.* ſhould forbear and give day of payment to the ſaid *J. H.* of the ſaid 1770*l.* ſo to be lent to the ſaid *J. H.* in manner aforeſaid, until the ſaid 1800*l.* mentioned in the ſaid promiſſory note ſhould become due and payable according to the form and effect thereof; (that is to ſay,) until the 16th day of *December* in the ſaid year of our Lord 1795, and that they the ſaid Plaintiffs for ſuch loan and forbearance of the ſaid 1770*l.* ſo to be lent and forborne as aforeſaid, ſhould take 30*l.* when the ſaid 1800*l.* mentioned in the ſaid promiſſory note ſhould become due and payable according to the form and effect thereof, to wit, on the 16th day of *December* in the ſaid year of our Lord 1795, and that for ſecuring the payment to the ſaid Plaintiffs, as well of the ſaid 1770*l.* as of the ſaid 30*l.* the ſaid *J. H.* ſhould deliver to the ſaid Plaintiffs the ſaid promiſſory note ſo made and indorſed as aforeſaid, to wit, at, *&c.* And the ſaid Sir *W.* further ſaith, That in purſuance of the ſaid agreement, the ſaid Plaintiffs afterwards, to wit, on, *&c.* at, *&c.* did lend to the ſaid *J. H.* the ſaid 1770*l.* in the manner ſo agreed upon as aforeſaid, and did forbear and give day of payment of the ſaid 1770*l.* until the ſaid 1800*l.* mentioned in the ſaid promiſſory note ſhould become due and payable according to the form and effect thereof, to wit, until the 16th day of *December* in the ſaid year of our Lord 1795: And the ſaid Sir *W.* further ſaith, That in further purſuance of the ſaid agreement, and for ſecuring the payment to the ſaid Plaintiffs, as well of the ſaid 1770*l.* as of the ſaid 30*l.* the ſaid *J. H.* afterwards, to wit, on, *&c.* at, *&c.* did deliver to the ſaid Plaintiffs, and the ſaid Plaintiffs did take and receive from the ſaid *J. H.* the ſaid promiſſory note ſo made and indorſed as aforeſaid: And the ſaid Sir *W.* further ſaith, That the ſaid 30*l.* ſo agreed to be taken as laſt aforeſaid by the ſaid Plaintiffs

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Rejoinder. Iſſue joined.

The bond in queſtion was given to ſecure the payment of ſix promiſſory notes at four months, drawn by one *James Haviland*, to the order of the Defendant, and by him indorſed to the Plaintiffs,

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Plaintiffs for the ſaid loan and forbearance of the ſaid 1770*l.* in the manner ſo agreed upon as aforeſaid, is above the rate of 5*l.* for the forbearance of 100*l.* for a year, to wit, at, *&c.* And the ſaid Sir *W.* further ſaith, That he the ſaid Sir *W.* afterwards, and after the ſaid 29th day of *Sept.* A. D. 1714, to wit, on, *&c.* at, *&c.* ſealed, and as his act and deed delivered to the ſaid Plaintiffs the ſaid writing obligatory with the ſaid condition thereunder ſubſcribed, for ſecuring to the ſaid Plaintiffs the payment of the ſaid 1800*l.* mentioned in the ſaid promiſſory note among other ſums of money; and the ſaid Plaintiffs then and there, to wit, on, *&c.* at, *&c.* accepted and took the ſaid writing obligatory from the ſaid Sir *W.* for the cauſe and purpoſe laſt aforeſaid. By means whereof, and by force of the ſtatute made in that caſe, the ſaid writing obligatory is wholly void in law; and this, *&c.* wherefore, *&c.*

The 2d plea ſtated a corrupt agreement to diſcount the ſame note thus: That the Plaintiffs ſhould lend *J. H.* 1770*l.* in manner and at the times following, *viz.* 770*l.* on the 14th *Aug.* 500*l.* on the 22d *Aug.* and 500*l.* on the 27th *Aug.* and ſhould forbear and give day of payment of the 1770*l.* until the promiſſory note ſhould become due; and that for the loan and forbearance of the ſaid 1770*l.* the Plaintiffs ſhould take 30*l.* when the promiſſory note ſhould become due.

The 3d plea: That the Plaintiffs ſhould give credit to *J. H.* for 300*l.* on the 14th *Aug.* and ſhould forbear and give day of payment of that ſum till the promiſſory note ſhould become due; and ſhould lend to *J. H.* 1470*l.* thus, *viz.* 470*l.* on the 14th *Aug.* 500*l.* on the 22d *Aug.* and 500*l.* on the 27th *Aug.*

The 4th plea, (which was on the note for 3000*l.*) after averring that *J. H.* was indebted to the Plaintiffs in 2500*l.* ſtated the corrupt agreement to diſcount thus: That the Plaintiffs ſhould forbear and give day of payment of the 2500*l.* till the promiſſory note ſhould become due; and ſhould lend to *J. H.* 450*l.* in this manner, *viz.* 200*l.* on the 26th *Aug.* and 250*l.* on the 28th *Sept.* and ſhould forbear and give day of payment of the 450*l.* till the promiſſory note ſhould become due; and that for forbearing and giving day of payment of the 2500*l.* and for the loan and forbearance of the 450*l.* the Plaintiffs ſhould take 50*l.* when the promiſſory note ſhould become due.

The 5th plea ſtated an agreement that the Plaintiffs ſhould lend to *J. H.* 2950*l.* in this manner, *viz.* 2700*l.* on the 26th *Aug.* and 250*l.* on the 28th *Sept.* and ſhould forbear and give day of payment of the 2950*l.* *&c.*

The 6th plea, (which was on the note for 2300*l.*) after averring that *J. H.* was indebted to the Plaintiffs in 1000*l.* ſtated that it was corruptly agreed between *J. H.* and the Plaintiffs, that the Plaintiffs ſhould lend to *J. H.* 2261*l.* 13*s.* 4*d.* thus: That they ſhould forbear and give day of payment of the 1000*l.* till the promiſſory note ſhould become due, and ſhould deliver to *J. H.* a bill of exchange on Sir *James Eſdaile* and Co. for 500*l.* at thirty days ſight, and another for 300*l.* at the ſame number of days; and that the Plaintiffs ſhould give credit to *J. H.* for 461*l.* 13*s.* 4*d.* and ſhould forbear and give day of payment of the 2261*l.* 13*s.* 4*d.* till the note ſhould become due, and for ſuch loan and forbearance ſhould take 38*l.* 6*s.* 8*d.* when the promiſſory note ſhould become due.

The 7th plea, after averring that *J. H.* was indebted to the Plaintiffs in 1000*l.* ſtated a corrupt agreement to diſcount thus: That the Plaintiffs ſhould forbear and give day of payment of the 1000*l.* till the promiſſory note ſhould become due, and ſhould lend to *J. H.* 1261*l.* 13*s.* 4*d.* in this manner, *viz.* 461*l.* 13*s.* 4*d.* on the 24th *Sept.* 500*l.* on the 27th *Oct.* and 300*l.* on the ſame day; and ſhould forbear and give day of payment of the 2261*l.* 13*s* 4*d.* *&c.*

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who were bankers at *Taunton*, (*viz.* one dated the 1ſt of *July* for 1500 *l.*; *one dated the* 13*th of* Auguſt *for* 1800l.; *one dated the* 25*th of* Auguſt *for* 3000 l.; *one dated the* 17*th* Sept. *for* 2300 l.; one dated the 17th of *October* for 2000 *l.*; and one dated the 26th of *October* for 2000 *l.*; amounting in all to 12,600 *l.*) and all of which had been diſcounted by them. The Defendant however in his pleas made no mention of the note for 1500 *l.* or either of thoſe for 2000*l.* but only relied on the manner in which the three bills for 1800*l.* 3000*l.* and 2300*l.* had been diſcounted, as uſurious; which was as follows:

The note for 1800*l.* was diſcounted on the 14th of *Auguſt*, thus:

By a draft on Sir *James Eſdaile* and Co. payable to *Haviland* or order, three days after ſight, for	£. 500	0	0
By ditto, at ſeven days ſight, for - -	500	0	0
By caſh carried to the credit of *Haviland*'s running account, - - - -	300	0	0
By twenty-three caſh notes of the Plaintiffs, payable on demand at their bank at *Taunton* or in *London* for 20 *l.* each, - - -	460	0	0
By one ditto for 10*l.* - - -	10	0	0
	£. 1770	0	0

The remaining 30*l.* was taken as intereſt on the note for the four months it had to run from the day on which it was diſcounted.

The note for 3000*l.* was diſcounted on the 24th (*a*) of *Auguſt*, thus:

By a draft on Sir *James Eſdaile* and Co. payable to *Haviland* or order, thirty days after date, for	£. 250	0	0
By caſh in diſcharge of a returned note of *Haviland*'s, dated the 18th of *April* 1795, and indorſed by the Defendant, for - -	1500	0	0
By caſh carried to the credit of *Haviland*'s running account, - - - -	1200	0	0
	£. 2950	0	0

The remaining 50*l.* was taken as intereſt on the note for the four months it had to run from the day on which it was diſcounted.

(*a*) This note was dated the 25th, and diſcounted on the 24th, being one day too ſoon, by miſtake.

The note for 2300*l.* was diſcounted on the 24th *Sept.* (*a*) thus:

	£.	s.	d.
By caſh in diſcharge of a returned note of *Haviland*'s, dated the 15th of *May* 1795, indorſed by the Defendant, for - - -	1000	0	0
By a draft on Sir *James Eſdaile* and Co. payable to *Haviland* or order, at thirty days after date, for	300	0	0
By ditto, at thirty days after date, for - -	500	0	0
By twenty caſh notes of the Plaintiffs for 10*l.* each	200	0	0
By caſh carried to the credit of *Haviland*'s running account - - - - -	261	13	4
	£. 2261	13	4

The remaining 38*l.* 6*s.* 8*d.* was taken as intereſt on the note for four months.

When the above notes were brought to the Plaintiffs to be diſcounted, the manner in which the money was to be advanced, and the reſpective dates of the drafts on the houſe of Sir *James Eſdaile* and Co. were directed by the perſons who brought them, and who (as it appeared from the evidence of the managing clerk in the plaintiffs houſe) might, had they wiſhed it, have had either caſh or bills payable on demand. Nothing was charged by the Plaintiffs for commiſſion, poſtage, ſtamps, &c.

This cauſe was tried before *Eyre* Ch. J. at the *Guildhall* Sittings after *Trinity* term 1797, when his Lordſhip directed the ſpecial jury, that the charge of uſury reſted wholly on the Plaintiffs having made no rebate of intereſt on the bills which had a long time to run; that they appeared to be in the nature of a remittance of the borrowers money to *London*, and that if the Plaintiffs had not taken more than a reaſonable compenſation for their trouble, unleſs indeed the mode of payment had been made a term on which alone the bills would be diſcounted, it was not uſury; that as to the bills of a ſhort date there appeared to him to be little doubt; that if the bills had borne a very long date it would have been ſtrong evidence of a device to elude the ſtatute; but that the bills at thirty days ſeemed to be of a middle kind; and it was for them to draw the line. The jury without heſitation found a verdict for the Plaintiffs. But on its being ſuggeſted that Lord *Kenyon* in *Matthews qui tam* v. *Griffiths*, *Peake's Ni. Pri.* 200. had delivered an opinion decidedly contrary to the verdict then given, *Eyre* Ch. J. made an order for the Plaintiffs to enter up their judgment as of

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(*a*) **This note having been dated the 17th, and not diſcounted till the 24th of the ſame month, the whole diſcount ought not to have been taken; but being admitted to be a miſtake, that was not inſiſted upon.**

Trinity term, according to an undertaking of the Defendant, but that execution ſhould be ſtayed, in order to give the Defendant an opportunity of applying to the Court for a new trial.

Accordingly a rule having been obtained to ſhew cauſe why the judgment ſhould not be ſet aſide and a new trial be had between the parties,

Adair and *Le Blanc* Serjts. were this day called upon to begin in ſupport of the rule (*a*). Wherever more than five *per cent. per annum* is taken for the loan or forbearance of money, with the knowledge and by the agreement of the parties, it is uſury, whatever the nature of the tranſaction may be. On the principle of the laws againſt uſury no conſent or requeſt of the perſon borrowing can make any alteration in the caſe, ſince thoſe laws were made to protect indigent men againſt themſelves. Indeed the form of pleading on the ſtatute of uſury ſhews that the conſent of the borrower can never vary the caſe; ſince it is always ſtated that it "was corruptly agreed," which neceſſarily implies conſent. Wherever country bankers have been allowed to receive more than five *per cent.* they have received it as a compenſation for the riſk, trouble, and expence of remittance. Here the idea of referring the exceſs of intereſt to thoſe circumſtances can only be an afterthought (*b*), as it formed no part of the original tranſaction, which was a mere tranſaction of loan and diſcount, and not of remittance. If indeed it could be divided into two parts, and the Court could underſtand that after the money had been paid down to the borrower upon the bills, a ſecond application had been made to the banker to remit part of that money to *London*, a queſtion might then ariſe if the ſum taken under the term of remittance was ſuch as any cuſtom authorized. Whether ſuch a charge of remittance were a device to evade the ſtatute or not, would be a point to be determined by the jury. But there is an eſſential difference between

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(*a*) The following preliminary objection to the argument was taken by *Shepherd* Serjt. That a writ of error had been brought on the firſt day of this term, the motion for a new trial made on the ſecond, and bail in error ſince juſtified; that the Defendant therefore had no right to have a motion for a new trial diſcuſſed, having expreſſed his intention of withdrawing the ſubject from the conſideration of the Court; that he recollected a ſimilar caſe in *K. B.* where the Court were of that opinion. *Sed per Eyre* Ch. J. Perhaps the writ of error was brought under an apprehenſion of execution being ſued out on the firſt of day of term. Where a point of importance is depending and the effect of ſuch an objection as the preſent would be to ſhut out that point in the court of error, we ſhall not allow the objection to prevail.

(*b*) In *Maddock q. t.* v. Sir *B. Hammett* and others, 7 *T. R.* 185. Lord *Kenyon* ſaid: "It ſhall not be permitted to a party who has knowingly received any thing *as intereſt*, to apply it afterwards to another account as he finds it convenient."

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between the caſes where a charge is profeſſedly made for commiſſion, and where no ſuch charge is profeſſed to be made, but more than five *per cent.* is actually taken. Nothing can take the latter caſe out of the ſtatute; but in the former it will at once appear to the Court and jury, whether the ſum taken is a fair charge for what it purports to be. If this had been a tranſaction of remittance, the banker would have had ſome certain rule to go by in his charge, as in the *Sudbury* caſe (*a*), where 5*s.* *per cent.* were taken; but here one bill for 500*l.* is drawn at ſeven days, and another for the ſame ſum at thirty days. Though the party remitting has a right to ſtipulate for a compenſation for the trouble and expence of remittance, yet he is not allowed to charge it in the ſhape of intereſt. This was the decided opinion of Lord *Kenyon* in the caſe of *Matthews qui tam* v. *Griffiths* and others, *Peake's Ni. Pri.* 200. (*b*)

Shepherd and *Runnington* Serjts. *contrà.* It is admitted that more than 5*l.* *per cent.* may be taken, if taken for commiſſion *eo nomine.* But the name cannot make the tranſaction more or leſs uſurious, for if it be ſubſtantially uſurious no device will protect the party; and, whether the money be received under one name or another, the reaſonableneſs of the charge muſt be decided by a jury. The objects of the ſtatute were two: 1ſt, To make void all bonds, contracts, and aſſurances for payment of money lent upon uſury. 2dly, To puniſh the party who takes ſuch uſurious intereſt. Before the firſt of theſe proviſions therefore can attach, there muſt be a contract. 4 *Bl. Com.* 158. *Loyd* v. *Williams*, 3 *Wilſ.* 261. *Murray* v. *Hardinge*, 2 *Bl.* 865. *per Gould* J. The terms of that contract are matter of fact. If it appears not to have been in the contemplation of the parties to take uſurious intereſt, it will not avoid the bargain. *Abrahams qui tam* v. *Bunn*, 4 *Burr.* 2253. The queſtion to be tried on this record was the exiſtence of a corrupt contract, which has been negatived by the jury. They have determined that the money received was fairly referable to the expence of remittance as much as if it had been ſpecifically ſtipulated for on that account. The contract for diſcount was complete when the borrower ſaid, I want bills diſcounted, and the lender anſwered, I will diſcount them. The remittance was as diſtinct a tranſaction as if it had taken place on

another

(*a*) *Winch q. t.* v. *Fenn.* Sittings after *H. T.* 1786. *B. R.* before *Buller* J. *cit.* 2 *T. R.* 52.

(*b*) The deciſion of that caſe was fully recogniſed by his Lordſhip in *Maddock q. t.* v. Sir *B. Hammett* and others, 7 *T. R.* 185.

another day. If therefore no part of the original contract was uſurious, nothing ſubſequent to that will vitiate the bond. 4 *Burr.* 2253. So in *Floyer* v. *Edwards*, *Cowp.* 115. Lord *Mansfield* ſays, "Uſury is an agreement *originally* to pay the principal, with intereſt above the rate of 5 *per cent.*" and cites *Hawk. P. C. c.* 82. *ſ.* 19. That a party is entitled in ſome caſes to take, not only 5 *per cent.* for legal intereſt, but alſo a reaſonable ſum for remitting, and other neceſſary incidental expences, is clearly ſettled. *Auriol* v. *Thomas*, 2 *T. R.* 52. *Bodily* v. *Bellamy*, 2 *Burr.* 1096. The true diſtinction is, whether the conditions of the contract are impoſed on the borrower or not; in the preſent tranſaction they were not. So where there is nothing to which the money taken can be applied, but intereſt, it is uſury. But here the exceſs of intereſt was fairly applicable to the expences of remittance. As to the caſe of *Matthews qui tam* v. *Griffiths*, it may be diſtinguiſhed from the preſent, for Lord *Kenyon* himſelf obſerved that a ſecond diſcount had there actually been paid on the notes in queſtion.

EYRE Ch. J. I will begin with ſtating my aſſent to the propoſition, that where a party on a contract for a loan intentionally takes more than 5 *l. per cent. per ann.* for forbearance of that loan, he is guilty of uſury. But I add to it this further propoſition, that whether more than 5 *l. per cent.* is intentionally taken upon any contract for ſuch forbearance, is a mere queſtion of fact for the conſideration of the jury, and muſt always be collected from the whole of the tranſaction as it paſſes between the parties. And I am of opinion that it never can be determined that any particular fact conſtitutes or amounts to uſury, till all the circumſtances with which it was attended, have been taken into conſideration. As on the one hand I am to carry into effect a law which the policy of all times has deemed uſeful, and which expreſsly provides againſt any ſubtle devices or evaſions by which its penalties may be eluded (and had it not been ſo provided, I ſhould have thought it my duty to uſe all the influence of my ſituation to prevent ſuch devices and evaſions from having any effect); ſo on the other hand common juſtice requires that the whole of the tranſaction ſhould be before the jury, and ſhould be taken fairly, with a juſt application of all the circumſtances to every concluſion of fact which the evidence will warrant. Being of that opinion I cannot agree to the doctrine laid down at the Bar, that this tranſaction was neceſſarily to be taken to be a mere tranſaction of loan and not of remittance; I think there was room to conſider it as a mixed caſe

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of loan and remittance, and that we ſhould do great injuſtice to the party, if we were to confine it to one and exclude the other. What is this caſe in matter of fact? *Haviland* applies to have his bills diſcounted; to which the banker agrees, and calculates the intereſt upon the time the bills have to run, as is uſual. He aſks how *Haviland* would have the money? *Haviland* deſires to have a part in caſh, part in account, and part in bills on *London* of different times to run. Had the banker told down the money, or tendered bank notes, and had *Haviland* put them into his pocket, or ſwept them into his hat, and then ſaid, "But I want to ſend money to *London*; will you take part of my money back and give me bills?" and the banker had accordingly done ſo and given theſe bills, I cannot ſee that there would have been any colour for calling it an uſurious tranſaction. Are we then to adminiſter juſtice on ſuch frivolous diſtinctions as the difference between the caſe I have put, and the caſe which actually happened? Can the uſury depend on the circumſtance of the money being told down or not? It was proved by the witneſs that the banker aſked, "How will you have the money?" Which ſhort queſtion includes whether he would have it in caſh or in caſh notes, or in account, or whether he had any deſire to have part of it remitted for him to *London*? The anſwer completes the tranſaction. Few words are neceſſary among men of buſineſs. Bills on *London* are given to a certain amount, and the reſt is taken in caſh, or that which is equivalent to caſh. When we are conſtruing any particular circumſtances given in evidence in order to found a concluſion of fact in any caſe, and eſpecially in a caſe of uſury ariſing upon a tranſaction between men of buſineſs, we ought to deal with thoſe circumſtances according to the common ſenſe of mankind. Surely there is a great difference between tranſactions with bankers, and the ordinary tranſactions between man and man. What paſſed between the parties, one of them being a banker, was equivalent to an agreement by the banker to diſcount *Haviland*'s bills in caſh; and equivalent to the actual diſcount of them; and alſo equivalent to an agreement to remit a part of that caſh to *London* for *Haviland*; for which laſt purpoſe bills on *London* were given. Is there any thing unreaſonable in the nature of this tranſaction? It has now become the courſe for bankers in the country to have credit on ſome houſe in *London* which is maintained at no ſmall expence, and by means of which remittances are made with great facility. But let us ſimplify this idea. *A.*

ſays to *B.* take my ſpecie, you can find better means of conveying it to *London* than I can, and pay it to the perſon in *London* whom I ſhall appoint. In ſuch a caſe, *A.* could not have ſent his ſpecie by the poſt, but muſt have hired a waggon for that purpoſe. Now if *B.* has eſtabliſhed a mode of conveyance which renders the remittance more eaſy to him, what is that to *A.* whoſe money is remitted? Is not the banker entitled to a recompence for the accommodation he affords to his cuſtomer; and if in ſuch caſes the remittance is uſually made by bills of thirty days, is not that a fair meaſure of a recompence, ſuppoſing there is no device in the tranſaction, and that the remittance is not intended to be uſed as a colour for putting more money into the banker's pockets for the mere forbearance of a loan than is allowed by law? I ſtated to the jury that if the banker had impoſed this remittance on the borrower as a term of the diſcount, it would have been uſury. I might have added, that if all conſideration of loan were out of the caſe, a banker may lawfully take as much money as he can get for his bills without the leaſt regard to the time they have to run. The authority of a caſe ſaid to have been determined at *Niſi Prius* has been very properly preſſed upon us in the argument. Certainly the opinions of the Judge who is ſaid to have decided that caſe are at all times entitled to the higheſt reſpect from me, and from every Judge in *Weſtminſter-hall*, and I never will haſtily decide againſt the adviſed opinion of that great lawyer. But in my apprehenſion we are here debating no queſtion of law; we are examining the evidence of a mere matter of fact, on an inquiry into a tranſaction between a banker and his cuſtomer. According to the letter of that caſe, as it has been reported to us, it was ſaid, that unleſs the payment is made in ready money (*a*), the tranſaction is uſurious; this would at once put an end to the banker's buſineſs. Neither in this nor in any other caſe of the ſame kind, does it neceſſarily happen that a ſingle farthing in ready money paſſes between the parties. Here part of the money was carried to *Haviland*'s account, the whole might have

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(*a*) According to a manuſcript note of *Matthews q. t.* v. *Griffiths*, mentioned by the counſel in ſupport of the rule, Lord *Kenyon* in the courſe of his opinion uſed the following expreſſions: "Where a party takes 5 *per cent.* diſcount as for ready money, and yet does not pay ready money, but bills payable at a future day, though both parties conſent to this tranſaction, and though it may be for the convenience of both, I am clear that it is uſury:" And, "This is an offence againſt the ſtatute of Uſury, for taking 5 *per cent.* for that which was not money at the time, and which was incapable of being converted into money's worth up to the extent for which the diſcount was taken."

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have been, and *non conſtat* when it would be actually advanced in caſh by the banker. The counſel for the Defendant ſuppoſed a caſe where part of the money was not to be paid till a month after the tranſaction. I agree that would be taking intereſt for money not in any ſenſe advanced, and would amount to uſury. But if part of the money were carried to the account of the borrower, though he did not mean to draw for it for ſome time, and did not actually draw for it till the whole time on the diſcounted bill was expired, no man would doubt of the fairneſs or lawfulneſs of the tranſaction; and yet an intereſt is gained for the whole of that time, upon money not actually advanced. Suppoſe on diſcounting a bill a banker gives his cheque made payable on demand; every one conſiders it as caſh, becauſe it may be converted into caſh directly: yet it may happen that the money may not be demanded for any given length of time. I am inclined to think that the jury conſidered theſe thirty days bills as caſh; and there is a great deal to be ſaid for it. It is true that they may be diſcounted by a holder, and ſo the taker of them may be charged with double intereſt, but they may alſo circulate through the country up to the moment of their falling due as caſh, and may paſs to all effective purpoſes as ſuch, and though I do not think it fit for me to ſay that ſuch bills are always to be conſidered as caſh, becauſe an ill uſe might be made of it, yet I cannot ſay that the verdict in this view of it was improper in this caſe. My opinion being, that the real tranſaction was juſt the ſame as if the whole ſum had been told down, and then a part had been returned for bills drawn to ſuit the borrower's convenience, for the purpoſe of remitting the money to *London*; I repeat, that I cannot agree that in uſury, more than in any other caſe, the whole tranſaction is not to be taken together: that it is not to be analyzed and reduced to all the parts of which it is compoſed, and to all the concluſions of fact, which fairly reſult from the whole of the evidence; and that the law does not ariſe from a fact ſo conſidered. Whether more than 5 *per cent.* be intentionally taken for the loan and forbearance of money, is the queſtion of fact to be decided by the jury. If it be proved that a bill is diſcounted, partly in caſh, and partly in bills upon *London*, payable of courſe at a future day; this is but evidence to prove the fact in queſtion, and may or may not prove that fact according to the explanations which may be given. If more than 5 *per cent.* was gained by the tranſaction, the exceſs according to circumſtances might be uſurious, or might

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ariſe from a part of the tranſaction collateral to the mere loan; lawful in its nature, and extremely convenient to the other party; neither unjuſt nor oppreſſive; contrary neither to the letter or to the ſpirit of the ſtatute. Nor do I think there is any danger in this doctrine. The tranſaction is always before a jury. It is for them to ſay whether it is a device, or a fair agreement on good conſideration; whether if there be any overplus, after the 5 *per cent.* taken for diſcount, it is properly referable to ſome lawful collateral conſideration, or not; if it be ſo referable, we ſhould do the groſſeſt injuſtice, if inſtead of diſtributing the tranſaction into the parts of which it is compoſed, we were by a ſtrict literal conſtruction upon evidence to pronounce the contract to be what in ſubſtance it is not, a contract for mere loan and forbearance. On the whole of the caſe, I ſee no ſufficient ground to ſay that the verdict is wrong. I thought the tranſaction ſo far doubtful at the trial, that I wiſhed the jury to conſider whether the giving theſe bills on *London* was not a mere cover for an uſurious contract. I ſaid that if the bills were drawn at a longer date than is uſual in the courſe of buſineſs, it ought to be conſtrued as a device. They were the beſt judges, and they thought there was no device: had they determined the other way, I ſhould not have quarrelled with their verdict; but I think there is no ſufficient reaſon for granting a new trial.

Heath J. I am of the ſame opinion with my Lord, and cannot therefore think this a caſe in which we ſhould grant a new trial. This was a tranſaction which commenced in diſcount and loan, and terminated in remittance. The queſtion then is, Whether theſe two things muſt be conſolidated, or whether they may not be divided? Now I think upon the evidence reported, that that queſtion cannot be again raiſed here, if it has once been properly ſubmitted to the jury; ſince they have decided it. The ſubſequent tranſaction of remittance was no part of the antecedent contract; the bargain for the diſcount was complete, and then the banker aſked the perſon who brought the bill, how he would have the money. The true queſtion is, whether the terms of the remittance formed the conſideration of the loan; for if they did, the tranſaction was uſurious. I agree to the general propoſition of law as laid down by the Defendant's counſel, but think it a queſtion for the deciſion of a jury. As to the caſe put at the Bar, of an agreement to leave a certain ſum in the banker's hands for a month, that would be a clear device to elude the ſtatute, and no jury could doubt of the intention. Thoſe who advance money may impoſe their own terms on thoſe who are in want of it; but thoſe who come with money to purchaſe bills, not being diſtreſſed men, need never be impoſed upon. In the weſt-country thirty days is the uſual time for which the bills are made to run; and ſometimes money is given for thoſe bills, when there is more money to be paid in *London* than there are bills upon that place. Conſidering the diſcount and remittance as ſeparate tranſactions, and the jury having found a verdict agreeable to the evidence, I think we cannot meddle with it.

Rooke J. I agree in opinion with my Lord and my Brother *Heath*. By the ſtatute law of this land, it is uſury to take more than 5 *l. per cent. per annum*. But where money is advanced under particular circumſtances, a man may be warranted in taking more than 5 *l. per cent.*, if the ſurplus be taken for additional expence, riſk, and trouble; generally ſpeaking, where a party prefers taking bills inſtead of ready money, it would be right for the banker to ſay, "I will make a rebate for the time the bills have to run." But if he does ſo, he has a right to add, "I muſt have ſo much for my trouble and expences;" and on ſaying this, a new contract would commence, and it would be for the jury to determine whether a fair ſum was taken or not. Here bills are brought to the banker to be diſcounted, and he aſks, "How do you chooſe to take the money, in caſh or in bills, and for what time?" The perſon who brought the bills, took part in caſh and part in bills at different dates. It was left to the jury to conſider whether this was not colourable, and more in fact taken for the commiſſion than was proper; and the jury found that nothing more was taken than was reaſonable. On a penal ſtatute ſhall we be ſo ſtrict for the purpoſe of defeating a fair claim? For I cannot but conſider this defence in the ſame light as I ſhould a proceeding on the other branch of the ſtatute; and think the preſent tranſaction entitled to as favourable a conſtruction as if it were the ſubject of a penal proſecution.

Rule diſcharged.

Milliken *v.* Fox and Another.

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The Court will not allow a Defendant to ſtrike out the entry of a judgment of *nolle proſequi* entered by the Plaintiff, as to one of the counts of his declaration after it has been demurred to. Nor will it in that ſtage of the proceedings determine a queſtion of coſts reſpecting ſuch a count.

A Rule was moved for by *Shepherd* Serjt. calling on the Plaintiff to ſhew cauſe why the entry of the judgment of *nolle proſequi* as to the firſt count of the declaration in this cauſe ſhould not be ſtruck out, or why the Plaintiff ſhould not pay the coſts of the count on which the *nolle proſequi* was entered.

The declaration was for goods ſold and delivered, with a *quantum meruit* and the common money counts. In the firſt count it was by miſtake ſtated, that the Defendant "was indebted for ſold and delivered," leaving out the word "goods." This count was demurred to, and judgment recovered pleaded to the others; on which the Plaintiff entered a *nolle proſequi* as to the firſt count, and replied *nul tiel record* to the other pleas.

Shepherd contended that the Plaintiff's object was to deprive the Defendant of his coſts on the demurrer, and cited *Cowper* v. *Tiffin*, 3 *T. R.* 511. where the 8 *Eliz. c.* 2. *ſ.* 2. was relied on; he ſaid there were other caſes where it had been held that after a demurrer, the Plaintiff cannot enter a *nolle proſequi*, *Roſe* & *ux.* v. *Bowler*, 1 *H. Bl.* 108. *Drummond* v. *Durant*, 4 *T. R.* 360.

Le Blanc Serjt. ſhewed cauſe in the firſt inſtance, and endeavoured to prove that the object of the application made ſo late in the term was only to carry the cauſe over till next term. He urged that if the Defendant was entitled to any coſts, they would be allowed on taxation after the trial of the cauſe, and that if the officer exerciſed his diſcretion improperly, then would be the ſeaſon to apply to the Court.

Eyre Ch. J. The ſingle queſtion is, Whether the Plaintiff has a right to enter a *nolle proſequi* in this ſtage of the proceeding? *Relictâ verificatione non vult ulterius proſequi* is to be found in every book of entries. The right to coſts is a matter for future conſideration.

Shepherd Serjt. took nothing by his motion (*a*).

(*a*) Vid. *Salk.* 456.

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KEATE *v.* TEMPLE.

On a motion for a new trial by a Defendant in an action againſt him for goods delivered to the uſe of a third perſon on his undertaking to ſee the Plaintiff paid, the Court will take into conſideration not only the expreſſions uſed, but the particular ſituation of the Defendant at the time of his undertaking, and the amount of the ſum for which he will thereby be made liable.

ASSUMPSIT for goods ſold and delivered, work and labour, and common money counts.

Plea. *Non aſſumpſit.*

This cauſe was tried before *Lawrence* J. at *Wincheſter* ſummer aſſizes 1797, when the principal facts in evidence were as follow:

The Plaintiff was a tailor and ſlopſeller at *Portſmouth*, and the Defendant the firſt lieutenant of his Majeſty's ſhip the *Boyne*. When that ſhip came into port, the Defendant applied to a third perſon to recommend a ſlopſeller who might ſupply the crew with new cloaths, ſaying, "He will run no riſk; I will ſee him paid." The Plaintiff being accordingly recommended, the Defendant called upon him, and uſed theſe words, "I will ſee you paid at the pay table; are you ſatisfied?" The Plaintiff anſwered, "Perfectly ſo." The cloaths were delivered on the quarter deck of the *Boyne*: ſlops are uſually ſold on the main deck: the Plaintiff produced ſamples to aſcertain whether his directions had been followed: ſome of the men ſaid, that they were not in want of any cloaths, but were told by the Defendant that if they did not take them, he would puniſh them; and others, who ſtated that they were only in want of part of a ſuit, were obliged to take a whole one, with anchor buttons to the jacket, ſuch as are uſually worn by petty officers only. The cloathing of the crew in general was light and adapted to the climate of the *Weſt Indies*, where the ſhip had been laſt ſtationed. Soon after the delivery, the *Boyne* was burnt, and the crew diſperſed into different ſhips. On that occaſion, the Plaintiff having expreſſed ſome apprehenſions for himſelf, was told by the Defendant "Captain *Grey* (the Captain of the *Boyne*) and I will ſee you paid; you need not make yourſelf uneaſy." After this the commiſſioner came on board the *Commerce de Marſeilles* in order to pay the crew of the *Boyne*; at which time the Defendant ſtood at the pay-table, and having taken ſome money out of the hat of the firſt man who was paid, gave it to the Plaintiff; the next man refuſed to part with his pay, and was immediately put in irons. The Defendant then aſked the commiſſioner to ſtop the pay of the crew, who anſwered that it could not be done.

The learned Judge in his directions to the jury ſaid, that if they were ſatisfied on the evidence, that the goods in queſtion were advanced on the credit of the Defendant as immediately reſponſible, the Plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furniſhed, the Plaintiff relied on being able, through the aſſiſtance of the Defendant, to get his money from the crew, they ought to find for the Defendant.

Verdict for the Plaintiff 576*l.* 7*s.* 8*d.*

A rule *niſi* for a new trial having been obtained on a former day by *Shepherd* Serjt. on the ground of the Defendant's undertaking being within the ſtatute of frauds (*a*),

Le Blanc and *Marſhall* Serjts. now ſhewed cauſe, and contended that the only queſtion in the caſe had been left to the jury, and decided by them, *viz.* Whether the ſailors were liable in the firſt inſtance, and the Defendant only came in aid of their liability: or whether the Defendant was immediately reſponſible? They ſaid that if the *Boyne* had been burnt before the delivery of the goods, the Plaintiff would have had no communication with the crew, and of courſe no ground of action againſt them; if therefore they were not liable on the original contract, the ſubſequent delivery would not ſhift the credit upon them.

Shepherd Serjt. in ſupport of the rule, was ſtopped by the Court.

EYRE Ch. J. There is one conſideration, independent of every thing elſe, which weighs ſo ſtrongly with me, that I ſhould wiſh this evidence to be once more ſubmitted to a jury. The ſum recovered is 576*l.* 7*s.* 8*d.* and this againſt a lieutenant in the navy: a ſum ſo large that it goes a great way towards ſatisfying my mind that it never could have been in the contemplation of the Defendant to make himſelf liable, or *of the ſlopſeller to furniſh the goods on his credit*, to ſo large an amount. I can hardly think that had the *Boyne* not been burnt, and the Plaintiff been aſked whether he would have the lieutenant or the crew for his paymaſter, but that he would have given the preference to the latter. The circumſtances of this caſe create ſome prejudice againſt the Defendant, but which I think capable of explanation. There is ſome appearance of harſhneſs in making the men purchaſe theſe cloaths againſt their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the ſervice in which they

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(*a*) 29 *Car.* 2. *c.* 3. *ſ.* 4.

were to be engaged. It was therefore the bounden duty of the officer to take ſome courſe to oblige the crew to purchaſe proper neceſſaries. We all know that a ſailor is ſo ſingular a creature, ſo careleſs of himſelf, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will riſk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his ſituation may require. The whole of the imputation then on the Defendant and Captain *Grey* amounts to this, that when the men were to be cloathed, they wiſhed them to be ſomewhat well dreſſed. I do not know but that this circumſtance may have had ſome influence with the jury. But I do not feel the force of it when oppoſed to the weight of the evidence on the other ſide, ſo as to make the officer liable for ſo large a ſum. From the nature of the caſe it is apparent that the men were to pay in the firſt inſtance: the Defendant's words were "I will ſee you paid at the pay table; are you ſatisfied?" and the anſwer then was, "Perfectly ſo." The meaning of which was, that however unwilling the men might be to pay themſelves, the officer would take care that they ſhould pay. The queſtion is, Whether the ſlopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the ſame ſituation, was not likely to be able to raiſe ſo large a ſum? Conſidering the whole bearing of the evidence, and that the learned Judge who tried the cauſe has not expreſſed himſelf ſatisfied with the verdict, I think this a proper caſe to be ſent to a new trial.

HEATH J. I am of the ſame opinion.

ROOKE J. I am of the ſame opinon.

Rule abſolute on payment of coſts.

MACDONALD *v.* PASLEY.

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C. by virtue of an order from *B.* to receive all money due to him on a particular account obtains three out of four inſtalments due from *A.* to *B.* on that account; theſe payments are afterwards queſtioned by *B.* who brings his action againſt *A.* for the whole ſum, and at the ſame time *C.* demands the 4th inſtalment; an application to the Court by *A.* to ſtay proceedings in the action againſt him by *B.* on his paying the 4th inſtalment to ſuch perſon as they ſhould appoint, was refuſed.

Semb. That nothing but a power of attorney or will, complying with the proviſions of 26 *Geo.* 3. *c.* 63. and 32 *Geo.* 3. *c.* 34. will warrant the payment to third perſons of money due from the public to ſailors and marines.

THE Plaintiff had been a ſailor on board the *Romney*, belonging to Commodore *Johnſon*'s ſquadron in 1781; the Defendant was the prize agent of that ſhip.

In 1789 the Plaintiff made the following note—

"*Liverpool*, *Nov.* 23, 1789.

"Pleaſe to pay to Mr. *Abraham Joſeph* or order, my ſhare "of prize-money for the *Romney*, for prizes captured by the fleet "under Commodore *Johnſon*, for which this ſhall be your "diſcharge.

"From your humble ſervant,
his
"JOHN + MACDONALD,
mark.

"To the agents for the
"*Romney*, *London*.

"Witneſs, *W. L. Moyley*."

All the prize-money due to the Plaintiff on account of the captures made in 1781, (which was payable by four inſtalments, *viz.* 3*l.* 4*s.*; 4*s.*; 2*l.* 15*s.* 6*d.*; and 3*l.* 2*s.* 6*d.*) had been paid to one *Grant* as indorſee of the above note; except the firſt inſtalment of 3*l.* 4*s.* The preſent action was brought by *Macdonald* againſt the Defendant, for the whole ſum, and *Grant* at the ſame time claimed the 3*l.* 4*s.* ſtill unpaid, as due to him.

A rule having been obtained to ſhew cauſe why, on payment of 3*l.* 4*s.* to ſuch perſons as the Court ſhould appoint, all further proceedings in the action ſhould not be ſtayed,

Adair, Serjt. ſhewed cauſe, and contended that the payments to *Grant* could not diſcharge the Defendant, ſince the note on which they were made did not comply with the directions of 26 *Geo.* 3. *c.* 63. (*a*), and 32 *Geo.* 3. *c.* 34. which were paſſed to protect

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(*a*) By 26 *Geo.* 3. *c.* 63. *ſ.* 1. "No letter of attorney or will made by any petty officer or ſeaman in the ſervice of his Majeſty, *&c.* to empower any perſon to receive wages, pay or allowances of money of any kind due for ſuch ſervice, ſhall be good, unleſs made revocable; if made by any ſuch officer or ſeaman then in the ſervice of his Majeſty, *&c.* ſuch letter of attorney or will muſt be ſigned before and atteſted by the captain, *&c.* and ſhall ſpecify the name of the ſhip and alſo the number at which the maker ſtands upon the ſhip's book; if made by any ſuch officer or ſeaman diſcharged from the ſervice of his Majeſty, and within the bills of mortality, it ſhall be atteſted by an officer appointed by the treaſurer of the navy; if at any of the ports where ſeamen's wages are paid, by the treaſurer of the navy's clerk; if at any other place by the miniſter" *&c.* By *ſ.* 2. "every ſuch letter of attorney or will ſhall contain the name of the ſhip protect ſailors and marines from impoſition. He inſiſted that if it was neceſſary to ſubject a letter of attorney to the reſtrictions of the above act, *à fortiori* it was ſo with reſpect to an order like the preſent, which was a leſs ſolemn inſtrument.

Le Blanc Serjt. in ſupport of the rule ſaid, that the Defendant was ready to pay into court the 3*l.* 4*s.* for the benefit of thoſe to whom it belonged: that in his preſent ſituation he muſt defend this action, with a certainty of paying coſts to the Plaintiff, if he failed, or to *Grant* if he ſucceeded; and that as the acts alluded to only related to letters of attorney, they were out of the queſtion in the preſent caſe.

EYRE, Ch. J. We ought not to decide againſt the Plaintiff on this ſummary application. If the ſum of 3*l.* 4*s.* had been the extent of the Plaintiff's demand, and another perſon beſides the Plaintiff had claimed it of the Defendant, he would then have been in the ſituation deſcribed: and having different claims made upon him for the ſame thing, it would be reaſonable that he ſhould be relieved. But that is not the ſtate of the preſent caſe. Here the Plaintiff ſays, that all the money which has been paid to *Grant* has been paid by the Defendant in his own wrong. There is a great deal of colour for the argument which has been uſed reſpecting the nature of the authority under which theſe payments have been made. If the Legiſlature thought fit to put a power of attorney under particular regulations, there is great reaſon to ſuppoſe that it was meant that the agent ſhould not be diſcharged by any thing leſs than a power of attorney. The defendant is not in that ſituation in which the Court ever does or can interfere. If he can ſhew that the payments have been made on good grounds he may then bring the 3*l.* 4*s.* into court.

Per Curiam, Rule diſcharged.

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to which the perſon granting the ſame laſt belonged, the reſidence, profeſſion, or buſineſs of the perſon in whoſe favour it is made, and the day of the month and place where it was executed." By 32 *Geo.* 2. *c.* 34. *ſ.* 1. theſe proviſions are extended to marines, and by *ſ.* 2. "No letter of attorney or order made by any petty officer, ſeaman, marine, *&c.* diſcharged from the ſervice of his Majeſty ſhall be good and valid, for receiving wages, prize-money or other allowances of money due for ſuch ſervice, unleſs atteſted by a clerk of the treaſurer of the navy," *&c.*

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A native of a foreign ſtate in amity with this country, taken in an act of hoſtility on board an enemy's fleet, and brought to *England* as a priſoner at war, is not diſabled from ſuing while in confinement, on a contract entered into as a priſoner at war.

ASSUMPSIT for wages due to the Plaintiff as a ſeaman.

Pleas. 1ſt, *Non aſſumpſit.*

2d, That the Plaintiff is an alien, born in foreign parts, *to wit*, in *Holland*, in parts beyond the ſeas, out of the allegiance of the King of *Great Britain*, and within the allegiance of a foreign power, and that before the ſuing out of the original writ of the Plaintiff, and before the ſaid day and year in the ſaid declaration mentioned, *to wit*, on, *&c.* a public and open war was commenced, waged, and carried on, and from thence hitherto hath been, and ſtill is waged and carried on, between our Lord the now King and his ſubjects, and the perſons exerciſing the powers of government in *Holland* and the inhabitants and people of *Holland* under ſuch government, *to wit*, at, *&c.* And that the Plaintiff before the ſaid day and year in the ſaid declaration mentioned, and at the ſuing out of the ſaid original writ of the ſaid Plaintiff, and alſo at the commencement of the ſaid war, was and ever ſince has been and ſtill is an enemy of our ſaid lord the King, adhering to the perſons ſo exerciſing the powers of government in *Holland*, and ſo being enemies of our ſaid lord the King as aforeſaid, *to wit*, at, *&c.* And this the Defendant is ready to verify: wherefore, *&c.*

3d, Plea. The ſame as the ſecond; only omitting "That the Plaintiff is an alien, born in foreign parts, *to wit*, in *Holland*, in parts beyond the ſeas, out of the allegiance of the King of *Great Britain*, and within the allegiance of a foreign power."

Replication. To the firſt Plea, joinder in iſſue.

To the 2d. Proteſting that the ſaid plea, and the matters therein contained, in manner and form as the ſame are above pleaded and ſet forth, are not ſufficient in law to bar the Plaintiff from having and maintaining his aforeſaid action againſt the Defendant; nevertheleſs, for replication in this behalf the Plaintiff ſaith, That he, before the making the ſaid ſeveral promiſes and undertakings of the Defendant, in the ſaid declaration mentioned, *to wit*, on, *&c.* was a priſoner of war, in cuſtody of the forces of our Lord the King, in parts beyond the ſeas, *to wit*, at the iſland of *Saint Helena*, *to wit*, at, *&c.* and being ſuch priſoner as aforeſaid, he the Plaintiff then and there was, by and with the conſent and permiſſion of the commanding officer of the forces of our ſaid lord the King, at the iſland of *Saint Helena* aforeſaid, hired, employed, and retained by the Defendant to ſerve as a ſeaman and mariner in and on board the ſaid ſhip or veſſel called the *Caledonia*, on his retainer, and at his ſpecial inſtance and requeſt; and he the Plaintiff did then and there ſerve as ſuch ſeaman or mariner in and on board ſuch ſhip or veſſel on a certain voyage whereon the ſaid ſhip or veſſel was then bound, *to wit*, from the iſland of *Saint Helena* aforeſaid, to the port of *London* aforeſaid, *to wit*, at, *&c.* Without this, that he the Plaintiff, at the time of ſuing forth the original writ of him the Plaintiff, was, or at any time hitherto hath been, an enemy of our ſaid Lord the King, adhering to the perſons exerciſing the powers of government in *Holland*, and ſo being enemies of our ſaid lord the King, as in and by the ſaid plea is above alleged. And this he is ready to verify: wherefore, *&c.*

To the 3d Plea. Inducement and traverſe, the ſame as to the 2d.

Rejoinder. Tendering iſſue on the traverſes.

Surrejoinder. Joinder in both iſſues.

This cauſe was tried before *Eyre* Ch. J. at the *Guildhall* Sittings after laſt *Trinity* Term, when it appeared in evidence, that the Plaintiff, being a native of *Oldenburgh* in *Germany*, was taken priſoner at the *Cape of Good Hope*, he then ſerving as a ſailor in the *Dutch* fleet under Admiral *Lucas*; that he was ſent from the *Cape* to *Saint Helena*, in a *Britiſh* frigate, as a priſoner of war, and was there put on board the *Caledonia*, a *Britiſh* merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from *Saint Helena* to *England* he was treated like the reſt of the crew, and did his duty to the ſatisfaction of the captain, the Defendant in the action; that on his arrival here, he was delivered over to the commiſſary with the other priſoners taken on board the *Dutch* fleet, and was at the time of the action brought in cuſtody as a priſoner of war. Verdict for the Plaintiff, 24*l.*

Shepherd and *Heywood* Serjts. on a former day, moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial be had; which was granted by the Court, after ſome heſitation.

Marſhall Serjt. now ſhewed cauſe. First, the Plaintiff being a *German* born is not an alien enemy within the legal acceptation of the term. Though there is no exact definition of alien enemy in any of the text writers, yet all the entries deſcribe him in the ſame way. *Alienigena natus in regno* Franciæ *in com. de B. ſub ligeantiâ*

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ligeantiâ adverſarii domini regis Angliæ, *de* Franciâ, *de patre et matre inimicis ipſius domini regis* Angliæ, *et eidem adverſario ſuo adherentibus oriundus*, &c. *Raſt.* 252. 3 *Inſtructor Cler.* 16. That the place of birth is material appears from 3 *Salk.* 28. *Comb.* 212. and *Carter* 48 and 191. in which laſt caſe it was objected, that the general averment of the Plaintiff's birth in the United Provinces was not ſufficient, becauſe there might be ſome place in thoſe countries not under the juriſdiction of the King's enemies. SECONDLY, Suppoſing the Plaintiff a native of *Holland*, and taken in actual hoſtility to this country, yet under the circumſtances of the caſe he is entitled to recover. Having entered into a contract with the licenſe of the King's officer, that licenſe may be preſumed to have been given with the King's permiſſion; and a licenſe to contract, neceſſarily implies a licenſe to ſue. The plea of alien enemy is not now favoured by the courts. Formerly an alien enemy was diſqualified in all caſes, and his goods might be ſeized; the reaſon given was, that his property was forfeited as a repriſal for the damage committed by the enemy. *Gilb. H. C. P.* 205. The reaſon at this day for the diſability of an enemy is, that he ſhall not recover effects which, being carried from hence, may enrich his country: and it has been holden, that the ſubject of a power at war, who came here before the war broke out, or who comes here even in time of war, with the King's permiſſion, may maintain an action. *Wells* v. *Williams*, 1 *Salk.* 46. Lord *Raym.* 282. The diſability is now confined to two caſes, *viz.* where the right ſued for is acquired in actual hoſtility, *Anthon* v. *Fiſher*, *Dougl.* 649, *n.*; and where the Plaintiff being an alien enemy is reſident in the enemy's country. *Brandon* v. *Neſbitt*, 6 *T. R.* 23. *Briſtow* v. *Towers*, 6 *Term Rep.* 35. THIRDLY, This defence is founded on an idea of a right in the conqueror to reduce his priſoners to ſlavery, which is contrary to the law of nations. If the commanding officer may compel the priſoners to labour, and ſubject them to puniſhment for diſobedience of orders, there is nothing to prevent his ſelling them for ſlaves. Among barbarous nations priſoners of war are put to death with cruelty; in a more advanced ſtate they are ſold for ſlaves; among civilized nations both are diſavowed, and their perſons are only confined, till ranſomed or exchanged. *Grotius de Jure Belli ac Pacis*, *l.* 3. *c.* 7. *ſ.* 9. If it be ſaid that the Plaintiff has made himſelf an enemy by his own act, the anſwer is, that a perſon who owes no natural allegiance to the power at war with us, may by his own acts ceaſe to be an

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enemy and become a friend; his character of enemy continuing no longer than while he adheres to the enemies of the King.

Shepherd and *Heywood* Serjts. in ſupport of the rule. Notwithſtanding the language of the entries, there is no ground afforded by any of the text writers for ſuppoſing that the diſability of an alien depends upon his birth. In *Co. Litt.* 129. *b.* an alien enemy is ſpoken of as "a *ſubject* to one that is an enemy to the King," not as a *native* of the country at war. Nor in the following books, *Theloall's Dig. l.* 1. *c.* 4. 1 *Black. Com.* 372. *Terms de la Ley* 36. *Foſt. C. L.* 185. *H. P. C.* 164. which treat of alien enemy, is any mention made of birth. It is true that birth raiſes and perpetuates the character of alien enemy; for by the law of *England* allegiance always follows the perſon; and if by the law of any other country the party could rid himſelf of his allegiance by his own act, it ought to be replied that he had done ſo. The circumſtance of birth however is no farther material than as it is *one* of the caſes which conſtitute alien enemy, and even that is not deciſive; for Lord *Holt* ſays that a perſon may be born in a country at enmity with us, and yet *infra ligeantiam Angliæ*; and he inſtances the attendants of an ambaſſador. *Comb.* 212. Now the preſent Plaintiff, when he accepted a commiſſion from the *Dutch* government, (for the commiſſion of the ſhip is his commiſſion,) became a ſubject of *Holland*, owed allegiance to *Holland*, and was liable to be proſecuted for the breach of it as a traitor. If then the Plaintiff ever became a ſubject of *Holland*, the next queſtion is, how far that character has been altered by ſubſequent events? A priſoner at war muſt be conſidered as much the ſubject of the country from which he was taken, as when he was in actual ſervice: and his detention is juſtified on no other principle than that of preventing ſuch country from having the benefit of his ſervice again. If he be releaſed, he will become *ſui juris*, and may put off the temporary allegiance which he owed to the country under which he ſerved: but the period is not arrived at which the preſent Plaintiff is become *ſui juris*. The conqueror might have ſlain him in battle: now the mercy of the conqueror has not changed his character; but it continues the ſame in priſon, as when no mercy had been extended to him. The Plaintiff is not treated as a neutral in this country, nor does that character attach while he continues a priſoner: if he endeavoured to eſcape and was ſhot in the attempt, the ſoldier ſhooting him would not be tried by the municipal law. He is confined and fed like any of

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the other *Dutch* priſoners. Indeed it is ſaid, *Vattel*, *l.* 3. *c.* 15. *ſ.* 230. that "volunteers taken by the enemy are treated as if part of the army in which they fight." The reaſon why no other plea is to be found in the entries than that of alien enemy *née*, is becauſe no other perſon coming under the deſcription of alien enemy could be reſident here. If an action be brought by a native of an hoſtile State, the Defendant may plead alien enemy on the diſcovery of the Plaintiff's birth: but any other alien becomes *ſui juris* by reſidence, except in the preſent caſe of a priſoner at war. The only remaining queſtion relates to the licence of the officer. The act of an individual can no more remove the diſability of an alien enemy to contract, than it can create the character of alien enemy. *Bro. Abr. Denizen*, *pl.* 20. Unleſs this were ſo, any *Engliſhman* by contracting with an alien enemy might relieve him from that character: but licenſe is an act of State. Beſides if licenſe is to be relied on, it ſhould have been pleaded. 7 *Mod.* 150. 1 *Ld. Raym.* 282. In *Brandon* v. *Neſbitt*, 6 *T. R.* 23. there were two pleas exactly ſimilar to the ſecond and third in the preſent caſe, and though they were demurred to, the Defendant had judgment.

EYRE Ch. J. The queſtion is, Whether on the evidence produced in this caſe the Plaintiff is to be conſidered as an alien enemy at the time when the writ iſſued? If he muſt be ſo conſidered, I take it to be a neceſſary conſequence that this action muſt fail. The fact is, that this man, being a native of ſome part of *Germany*, and therefore a neutral by birth, was found on board a ſhip belonging to the enemies of this country, and was captured in actual hoſtility. What then is his ſituation? Having been taken in the act of hoſtility, he is either a pirate, or *quoad* that act of hoſtility a ſubject of the prince or power under whoſe commiſſion he acted. No doubt, this man being a neutral by birth committed an act of hoſtility againſt this country, under a commiſſion from a ſtate at war with this country. So far I take to be clear. I therefore go a great way with the Defendant's counſel, who have argued that at this day the form of the plea of alien enemy, which ſtates the party to be alien enemy born, is not abſolutely neceſſary to be adhered to in excluſion of every other caſe of enmity. In the courſe of the argument we have had many reaſons and authorities adduced to ſhew, that if a man is really to be conſidered as alien enemy, though not a native of the country at war, he is ſo to be conſidered as to all the conſequences

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ſequences which apply to alien enemy by birth. But here the Plaintiff became an enemy in conſequence of having participated in one ſingle act of hoſtility. Now ſuppoſe it had been the pleaſure of this ſtate to ſhew him favour. Suppoſe this had been ſaid, "You are a neutral, and perhaps have been drawn into the act in which you were engaged: you are at liberty to return to your own country, or you may remain here, as you are the ſubject of a Prince in amity with us." It has been admitted in argument, that as ſoon as he ſhould become *ſui juris*, the character of enemy would be purged. If then the Crown had not thought fit to hold the Plaintiff priſoner at war, he could not have been conſidered as ſuſtaining the character of enemy, but would have been treated as the ſubject of a State in amity with this country. The difficulty of the caſe, if there be difficulty, ariſes from the Plaintiff having been detained as priſoner at war: it has been contended that if, at the moment of capture, he was alien enemy, that character muſt continue till he ceaſes to be priſoner at war. That part of the argument I never was ſatisfied with; I cannot deny that he was captured as alien enemy; at that moment he was ſo: but how came he to be ſo? Not in conſequence of any permanent character of enemy, but becauſe he had joined in one act of hoſtility, for which act he is not, according to the rigour of antient war, put to the ſword, or delivered into the hands of the individual who took him priſoner, to be kept priſoner by him, till he ſhould receive the ranſom; but he remains in the hands of the King till he is ranſomed by an exchange for the benefit of the State, or ſet at liberty by the King's command. But how does this tend to fix on him the permanent character of alien enemy? That character ariſes from the party being under the allegiance of the State at war with us; the allegiance being permanent, the character is permanent, and on that ground he is alien enemy, whether in or out of priſon. But a neutral, whether in or out of priſon, cannot, *for that reaſon*, be an alien enemy; he can be alien enemy only with reſpect to what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceaſed to be in hoſtility againſt us; it being only in reſpect of his being in a ſtate of actual hoſtility that he was even for a time an enemy at all. As a priſoner of war, how does he differ from any other individual who is in cuſtody for an offence which he has committed, and for which he is anſwerable? Captain *Vaughan* (*a*) was not an alien enemy, but being a natural born ſubject of this realm, he became a traitor; for that he was put in priſon, for that he anſwered, and with his life. But it was for that act of hoſtility merely. With regard to his character of a ſubject, he remained, till the moment of his execution, as if that act had never been committed. There is very little light to be procured from our books, to aſſiſt us in our inquiry, how far a neutral joining in an act of hoſtility is to be conſidered as having acquired the character of alien enemy. The ſubject was indirectly diſcuſſed in the caſe of Captain *Vaughan* to which I have alluded. He was charged in the indictment (*b*) with adhering to the King's enemies, by cruiſing *cum ſubditis Gallicis*; the fact was, that many of his crew were not natural born ſubjects of the *French* King, but *Hollanders*. It was made a queſtion whether the *Hollanders* could be called *ſubditi Gallici*; and though the point was not authoritatively decided, becauſe ſome of the crew were certainly *French*, which was ſufficient to ſupport the indictment, yet it was held by *Holt* Ch. J. and agreed to by the reſt of the Court, that the *Hollanders* by accepting a commiſſion from the *French* King became *ſubditi Gallici* and ſo remained, *during the continuance of their ſervice*, in a ſtate of qualified ſubjection, ariſing out of the ſervice, and *determining with it*. This, had it been the very point in judgment, would have gone a great way towards deciding the preſent queſtion. The commiſſion under which the Plaintiff, being a *German*, acted, was put an end to by the capture of the frigate in which he was. After that time he had no opportunity of continuing in the ſervice of the State of *Holland*; and his temporary character of alien enemy ceaſed and determined with the authority under which he acted. Captain *Vaughan*'s caſe, as far as it goes, draws a line, and fairly marks out when that character begins, and when it ſhall end. I am of opinion that it is determined by the very nature of the ſubject, and being ſo determined, why ſhould we deſire to enlarge the diſability of the Plaintiff, or continue it, until the war is concluded? Why, but in order to let in one of the harſheſt, one of the moſt impolitic, nay immoral defences that ever was ſet up in a court of juſtice? This man, whether he was under a ſafe conduct or not, did his duty faithfully, and was duly approved of by the officer of the *Caledonia*. That ſhip was in ſuch diſtreſs, that ſhe was, as it appeared at the trial, under the neceſ-

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(*a*) 5 *State Trials*, p. 17. No. 162.

(*b*) See 6 *State Trials*, Appendix.

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ſity of taking in more hands at *Liſbon*, and probably would have been loſt without ſuch aſſiſtance as was afforded by the Plaintiff. He now only aſks for a moderate reward, and is paid with a plea of alien enemy. This is certainly one of the hardeſt caſes I ever knew, and I think we ought to lean againſt it. And if a diſtinction is to be found between the permanent character of alien enemy, to which the courts of juſtice cannot give protection, and the temporary character, we ſhall readily adopt it. As to the ground of policy which has been taken in argument for the Defendant, namely, that a benefit would reſult to the enemy from the Plaintiff's recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be ſatisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, profeſſing himſelf hoſtile to this country, and in a ſtate of war with it, cannot be heard if he ſue for the benefit and protection of our laws in the courts of this country. We do not allow even our own ſubjects to demand the benefit of the law in our courts, if they refuſe to ſubmit to the law and the juriſdiction of our courts. Such is the caſe of an outlaw. Modern civilization has introduced great qualifications to ſoften the rigours of war; and allows a degree of intercourſe with enemies, and particularly with priſoners of war, which can hardly be carried on without the aſſiſtance of our courts of juſtice. It is not therefore good policy to encourage theſe ſtrict notions, which are inſiſted on contrary to morality and public convenience. As the real juſtice of the caſe is with the verdict, and a legal diſtinction to exclude this unworthy defence can fairly be maintained, I think no new trial ſhould be granted.

HEATH J. I am quite of the ſame opinion with my Lord, and I am glad that ſome legal ground can be found, on which we may repel this diſhoneſt defence. I will firſt conſider, Whether, in a plea of alien enemy, it is neceſſary to ſtate that the Plaintiff is alien enemy by birth? The forms of pleading have always been conſidered as ſtrong evidence of the law, and it is ſaid that they all aver that the party was born in the country at war with us. But I obſerve that in 4 *Mod.* 405. where the plea was "*alienigena in regno* Franciæ *ſub ligeantia adverſarii domini regis*, &c. *oriundus*," exception was taken on demurrer that it ought to have been *natus*, and ſome precedents being cited out of *Raſtall*, where the word "*natus*" was ſupplied by "*oriundus*," the plea was held good. Next, as to the general queſtion, the pleas ſtate that the

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Plaintiff was adhering to the King's enemies; they muſt be proved in all their parts; but a priſoner at war is not adhering to the King's enemies, for he is here under protection from the King. If he conſpires againſt the life of the King, it is high treaſon; if he is killed, it is murder; he does not therefore ſtand in the ſame ſituation as when in a ſtate of actual hoſtility. It has been ſaid, that a priſoner at war cannot contract; his caſe would be hard indeed if that were true. Officers on their parole muſt ſubſiſt like other men of their own rank; but according to ſuch doctrine they muſt ſtarve; for they could gain no credit if deprived of the power of ſuing for their own debts. It has alſo been urged, that if the Plaintiff was under a protection, that circumſtance ought to have been pleaded, and this is true of a formal protection under the great ſeal; but there may be a protection ariſing from ſituation, which need not be pleaded. If a priſoner of war is in confinement, he is protected as to his perſon; if he is on his parole, he requires further protection than what relates merely to his perſon. The contract in queſtion was made by the permiſſion of the King's officer, and therefore by the licence of the King, under whoſe authority the officer may be preſumed to have acted. I will add one caſe to ſhew that a priſoner at war may ſue and be ſued. The ſon of the celebrated *Miſſiſſippi Law* was brought over here as a priſoner at war, and being on his parole, was arreſted for 10,000*l.* by the executor of a creditor, who ſwore that he was indebted as appeared by the teſtator's books; he was diſcharged however, not becauſe he was a priſoner at war, but becauſe the executor had not inſerted in his affidavit that he was indebted "as he believed." If a priſoner of war can be ſued, there is no reaſon why he ſhould not ſue. How is it with felons? They may be charged in execution, and yet their bodies are at the King's diſpoſal. For theſe reaſons I think the Plaintiff, being a priſoner at war at the time of making the contract, may maintain an action on that contract, and is protected by law.

Rooke J. This queſtion does not come before us upon demurrer, but on the ſingle point whether the iſſue is rightly found. The defence has no foundation in conſcience, in juſtice, or in public policy, and I do not feel diſpoſed to aſſiſt it. An enemy under the King's protection may ſue and be ſued: that cannot be doubted. A priſoner at war is, to certain purpoſes, under the King's protection, and there are many caſes where he can maintain an action. I will ſuppoſe that an officer of high rank on his

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parole is poſſeſſed of a ring or a jewel of great value, on which he wants to raiſe money, and that a tradeſman is ſo diſhoneſt as to receive it from him, and refuſe either to advance the money or return the pledge. Surely the Court would ſay that he might recover his ring or his jewel from the tradeſman. The preſent Plaintiff has in fact done much the ſame thing. Under the licence of the King's officer he pledged his labour at *St. Helena*, in order to procure a more comfortable ſubſiſtence. Accordingly he worked his way over, and earned a reaſonable compenſation. That being the caſe, I ſee no reaſon why he ſhould not recover, even if he were alien enemy *born*. But as my Lord has not thought proper to go ſo far, I ſpeak to that point with diffidence; and ſhall rather avail myſelf of the diſtinction which has been drawn between the temporary and permanent character of alien enemy; laying in a claim however, to ſay, at any future day, that a perſon in the ſituation of the Plaintiff is like the officer who pledges his jewel; for this contract was made under the licence of thoſe who had authority to licenſe the contracting party.

Rule diſcharged.

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ROTHWELL *v.* COOKE.

In an inſurance on a ſhip at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, the voyages from *Hull* to *Portſmouth* where ſhe meets with convoy, and from thence to *Bilboa*, may be conſidered as diſtinct, and in caſe of a loſs between the two latter places, an apportionment and return of premium may be demanded.

THIS was an action on a policy of inſurance on the ſhip *Manning* at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy: the declaration alſo contained a count for money had and received.

The cauſe was tried before *Eyre* Ch. J. at the *Guildhall* Sittings after laſt *Eaſter* term, when it appeared in evidence that the ſhip ſailed from *Hull* to *Portſmouth*, and from thence departed with a convoy, which, not being direct for *Bilboa*, ſhe afterwards left, and was captured; on this evidence the Plaintiff would have been nonſuited; but on his counſel inſiſting that he was entitled to a verdict for the premium, which had not been returned, under the count for money had and received, a verdict paſſed for the Plaintiff for the whole premium.

To ſet aſide this verdict and enter a nonſuit, a rule *niſi* was obtained by the Defendant in *Trinity* term laſt, on the ground of the riſk having commenced.

Le Blanc Serjt. in the ſame term ſhewed cauſe. I contend that there were two riſks; one from *Hull* to the place where the convoy was to be met with, and another from thence to the port of diſcharge. In *Stevenſon* v. *Snow*, 3 *Burr.* 1237. 1 *Bl.* 315. 318. the premium was apportioned on this ground. In that caſe, though a uſage was found by the jury, yet it was diſclaimed by the Court as the foundation of their opinion. Lord *Mansfield* ſaid, in the caſe of *Long* v. *Allen*, *Park.* 390. "my opinion has been to divide the riſks." The doctrine of theſe caſes was attempted to be controverted when this rule was firſt granted by the three caſes of *Tyrie* v. *Fletcher*, *Cowp.* 666. *Loraine* v. *Tomlinſon*, *Doug.* 585. and *Bermon* v. *Woodbridge*, *Doug.* 781. The firſt of theſe is diſtinguiſhable from the preſent as having been an inſurance for a term of twelve months, and the ſhip captured at the end of two; the Court there recogniſed the caſe of *Stevenſon* v. *Snow*, but thought the caſe under their conſideration not within its principle. The ſecond was alſo an inſurance for time; in ſuch caſes there can be no diviſion of riſk, for if the principle were once admitted, no line could be drawn; ſince if the premium were apportioned for each month, it might as well be apportioned for each week or each day. The third, which was a policy at and from *Honfleur* to the coaſt of *Angola*, during the ſtay and trade there, at and from thence to *St. Domingo*, and at from *St. Domingo* back to *Honfleur*, was decided on the ground of the riſk having been conſidered by the parties, as one entire riſk and not diviſible, eſpecially as there was no contingency mentioned on the happening of which the inſurance could be put an end to. *Stevenſon* v. *Snow*, was alſo recogniſed in that caſe. Here two voyages are imported on the face of the policy; the riſks are of different natures, one being without convoy, the other with. If this were not the caſe, the going into a particular port, as *Portſmouth*, would be a deviation from the original voyage from *Hull* to *Bilboa*.

Shepherd Serjt. in ſupport of the rule. Two caſes have been relied on, *Long* v. *Allen* and *Stevenſon* v. *Snow*. In the firſt an expreſs uſage was found by the jury, which muſt have been ſuppoſed to have been known to the parties, and therefore incorporated into the contract. In the latter alſo a uſage was found by the jury; and though the Court rejected it for uncertainty, yet Lord *Mansfield* ſays, in *Tyrie* v. *Fletcher*, that "they argued from it that there being ſuch a cuſtom plainly ſhewed the general ſenſe of merchants as to the propriety of returning a part of the premium in ſuch caſes." The principle of the caſes of policies for time does not differ from the preſent; and Lord *Mansfield* ſays, in *Bermon* v. *Woodbridge*, "if you could apportion the premium in any caſe, it would be in inſurances upon time." On the face of this policy there are not two voyages, unleſs it be conſidered as a general rule that there are two voyages wherever the convoy is not appointed at the port of loading.

Eyre Ch. J. We will conſider of this caſe. Either the voyage inſured is to be conſidered as in effect two voyages with two diſtinct premiums, or one voyage only with one premium. Suppoſing there were two voyages; if the ſhip had been loſt on the firſt, there ought to be a return of premium upon the ſecond; but I cannot think that in ſuch a caſe a return would have been demanded. *Bermon* v. *Woodbridge* is very ſtrong againſt two voyages; the outward bound voyage might there have been conſidered as a diſtinct riſk; and if it was there thought that no return ſhould be made, it ſhakes the principle of *Stevenſon* v. *Snow*. Before we decide in favour of a return, we muſt ſee diſtinctly that there were two voyages and two diſtinct premiums conſolidated into one.

Heath J. It is difficult to reconcile the caſes on principle. One went on uſage; in *Stevenſon* v. *Snow*, on the other hand, uſage was diſclaimed, and yet the Court relied on the opinion of all mankind, which is uſage.

Rooke J. As theſe contracts are entered into every day, we ought to adhere to the deciſions on the point. Where the Courts have decided againſt a return of premium, they have diſtinguiſhed the caſes from *Stevenſon* v. *Snow*. It has been the courſe of conſtruction to divide ſuch a policy as this into two voyages. If the ſhip does not depart from *Portſmouth* with convoy, the contract ceaſes as to the latter part, though it remains good as to the former. The word *England* here anſwers to the word *Portſmouth* in other caſes. As the Courts have been anxious not to overturn *Stevenſon* v. *Snow*, I ſhould be unwilling to do what they have avoided. That caſe is probably conſidered as law at *Lloyd's* coffee-houſe.

Cur. adv. vult.

Early in this term the Court recommended the parties to compromiſe the matter. In conſequence of which it was not mentioned again till this day, when the Court finding on inquiry that it had not been ſettled,

Eyre Ch. J. ſaid, The verdict now ſtands for the return of the whole premium, and the queſtion is, Whether it ſhould ſtand for the whole, for none, or for a part? If for a part, I do not know how we are to ſettle it; it muſt depend on there being or not being ſome

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ſome rule to be found to direct us in making the deciſion. Certain it is, that if the ſhip had been loſt in coming round to *Portſmouth*, the underwriters would have been liable; it is not therefore reaſonable that they ſhould have been ſo liable without retaining a proportion of the premium. You ſhould inquire whether there is any rate of premium among the underwriters from *Hull* to *Portſmouth*, and whether the premium has ever been apportioned where there has been only one inſurance, without diſtinguiſhing the different riſks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned; and therefore the preſent verdict muſt be ſet aſide, and the caſe go to a new trial.

Per Curiam, Rule abſolute.

ATKINSON *v.* ABRAHAM.

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It is no ground for ſetting aſide an award, that one of the Defendant's witneſſes was re-examined by the arbitrator after the evidence was cloſed on both ſides, and the Plaintiff's attorney gone, though by a different teſtimony from what he gave at firſt the arbitrator's opinion was influenced: Unleſs ſuch re-examination was brought about by the management of the Defendant's attorney.

WILLIAMS Serjt. moved for a rule to ſhew cauſe why an award made in conſequence of a reference in an action of trover for a ewe and lamb, at the laſt lent aſſizes, before *Thompſon* B. ſhould not be ſet aſide.

The ground of the application was this: After the evidence before the arbitrator was cloſed on both ſides, and the Plaintiff's attorney was gone, one of the Defendant's witneſſes was re-examined, and gave a teſtimony different from that which he had given before, and by which the arbitrator confeſſed his judgment was influenced.

Sed per EYRE Ch. J. Upon what ground in law is it that the ſecond examination will impeach this award? This is clear, that if the arbitrator thought proper to aſk the witneſs a queſtion for his own information after the evidence was cloſed, that circumſtance will not induce us to ſet aſide the award. If indeed it appeared that there was any ſurprize in it; that the ſecond examination had been brought about through the management of the Defendant's attorney, that might be a good ground of objection. Beſides, this ſeems a matter of too little conſequence to be opened again.

Per Curiam, Rule refuſed.

Nov. 28th.

BROUGHTON *v.* MARTIN.

The Court will diſcharge a Defendant out of cuſtody who is in execution at the ſuit of a Plaintiff ſome time ſince deceaſed, on whoſe part no will has been proved, nor any adminiſtration granted, and whoſe family, on notice of a motion for the above purpoſe, declines interfering.

SHEPHERD Serjt. on a former day moved for a rule to ſhew cauſe why the Defendant ſhould not be diſcharged out of cuſtody, on an affidavit, ſtating that he had been three years in execution at the ſuit of *Delves Broughton* Eſq. who died at *Gibraltar* ſixteen months previous to this application, and that he had cauſed a ſearch to be made in the Commons, the reſult of which was, that no will had been proved there, nor any adminiſtration granted.

At firſt the Court doubted; but afterwards granted a rule *niſi*, directing, at the ſame time, that it ſhould be made part of the rule, that notice of the preſent motion ſhould be ſerved on the attorney of the *Broughton* family.

On this day *Shepherd* mentioned this matter again, and cited the caſe of *Wagſtaffe* v. *Darby*, 1 *Barnes*, 258.; and the attorney for the *Broughton* family attending and informing the Court that the relations of the deceaſed declined interfering, and had not taken out, and did not mean to take out letters of adminiſtration,

The Court ſaid, they wanted nothing but precedent to warrant them in doing what was deſired, as it was a reaſonable thing to be done; and that as the *Broughton* family had received notice, and there was no probable ground to ſuppoſe that adminiſtration would be taken out, they thought they might make the

Rule abſolute.

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CROOKS One, &c. *v.* HOLDITCH.

Bailable proceſs was ſued out previous to the paſſing of the 37 G. 3. c. 45. which regulates the form of the affidavit to hold to bail; this proceſs was renewed four ſeveral times without any new affidavit, and the 4th renewal, on which Defendant was arreſted, was ſubſequent to the paſſing of the above act; and held no objection to ſuch proceſs that it was founded on an affidavit not complying with the 37 *G.* 3. *c.* 45.

COCKELL Serjt. ſhewed cauſe againſt a rule *niſi* for entering a common appearance, the affidavit to hold to bail having omitted to negative a tender in bank notes.

The affidavit was made on the 10th *March* 1796, on which a writ of attachment of privilege was ſued out; but the Plaintiff not having been able to arreſt the Defendant before the return of that writ, renewed his proceſs four ſeveral times; the laſt proceſs was taken out after the paſſing of the Bank Act, 37 *G.* 3. *c.* 45. and the Defendant was actually arreſted on 5th *July* 1797.

Shepherd Serjt. in ſupport of the rule. It does not appear on the face of the proceſs on which the Defendant was arreſted, that

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any former proceſs had iſſued. The *præcipe* was "attachment for *William Crooks* Gent. one, &c. againſt, &c. Oath 17*l.* and upwards." The queſtion is, Whether a new affidavit made according to the directions of the act, was not neceſſary, when the laſt proceſs was ſued out?

EYRE Ch. J. The continuances ought to have been by *alias* and *pluries*; and though theſe ſubſequent writs may, by miſtake, have iſſued in the form of firſt proceſs, yet in the nature of the thing, they muſt be conſidered as continuances. If the affidavit was regular at firſt, no new affidavit can be requiſite. We cannot ſay that what once was regular, is irregular now, becauſe an act of parliament has intervened. That act requires, that with reſpect to all holding to bail on affidavit, ſubſequent to the date of it, the affidavit ſhall expreſs ſo and ſo, which cannot apply to regulate the form of an affidavit made before the paſſing of the act. We muſt adopt a conſtruction which does not require impoſſibilities.

Per Curiam, Rule diſcharged.

FRANCISCO *v.* GILMORE.

Nov. 28th.

A. captain of an India country trader contracts in India with *B.* for a crew according to the cuſtom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *Weſt Indies* and back again; action by part of the crew for wages due on the *Weſt India* voyage; and held on motion for a mandamus to examine witneſſes in *India*, that the cauſe of action did not ariſe in *India*, within 13 G. 3. c. 63. ſ. 44.

THE Defendant was captain of the *Eliza-Anna*, an *India* country trader, and the Plaintiff one of her crew. It is the cuſtom of the *India* country trade for the captains of ſhips to contract with a perſon called a *Serang* (or captain of an *Indian* crew) for a number of ſeamen, for whom he pays the *Serang* at a certain rate *per* man *per* month; the captain is not anſwerable to the crew for their wages, but to the *Serang* alone, to whom the crew look for payment. In this manner the Defendant contracted with a *Serang* at *Bengal* for a crew; his ſhip was then taken up by the government of that country, and ſent to *England* with rice; having landed her cargo here, ſhe was ſent with troops to the *Weſt Indies*, and from thence back again to *England* with invalids. Being again arrived here, the Plaintiff, together with eighteen other ſeamen, quitted the ſhip, and commenced actions againſt the Defendant for wages; to which he put in bail, and ſoon after ſailed for *India*, with the *Serang* and the reſt of the crew on board.

Shepherd Serjt. on a former day moved, that a writ in the nature of a *mandamus* might iſſue in this cauſe, directed to the mayor and aldermen for the time being, being the judges of the mayor's court at *Bombay* in the *Eaſt Indies*, commanding them the ſaid mayor and aldermen to hold a court for the examination of witneſſes on the part of the Defendant in this cauſe, and for receiving proofs in this cauſe purſuant to the directions made in the 13th year of the reign of his preſent majeſty (*a*), and to perform all ſuch other matters and things as by the directions of the ſaid ſtatute are required, and that the depoſitions taken in manner aforeſaid, might be tranſmitted, under ſeal of the ſaid Court, to one of the ſecondaries of this honorable Court, and that the ſame might be read and given in evidence in this cauſe, and that the trial of this cauſe might be put off until after the return of the ſaid writ.

The grounds of the application were, that the contract with the *Serang* in *Bengal* was the cauſe of action, and that the *Serang* and many of the crew, who were natives of *India*, and reſident there, were material witneſſes in the cauſe.

The Court granted a rule *niſi*, but directed that notice ſhould be given to the Solicitor of the *Eaſt India* Company of the ſituation of the Plaintiff and the other eighteen ſeamen.

Cockell and *Marſhall* Serjts. now ſhewed for cauſe affidavits ſtating the circumſtance of the *Weſt India* voyage, which had not been diſcloſed by the original affidavits; and that the action was brought for wages earned during the voyage from *London* to the *Weſt Indies* and back again; and they contended, that the cauſe of action aroſe in *London*, and not in *India*, and therefore did not come within the meaning of the act.

Adair Serjt. for the *Eaſt India* Company, ſaid, that the Company, on application, always relieved the diſtreſs of perſons in the Plaintiff's ſituation, and not only thoſe who were in their own ſervice, but frequently thoſe left here by foreign ſhips.

In ſupport of the rule, *Adair* and *Shepherd* inſiſted, that although the voyage to the *Weſt Indies* was not in the contemplation of the parties when they left *India*, yet that as the Defendant had contracted with the *Serang* for each man at a rate *per* month, it was a general contract, not limited to any particular voyage; and

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(*a*) By 13 *Geo.* 3. *c.* 63. *ſ.* 44. it is enacted, "That when and as often as the *India* Company, or any perſon or perſons whatſoever, ſhall commence and proſecute any action or ſuit in law or equity, *for which cauſe hath ariſen or ſhall hereafter ariſe in India*, againſt any other perſon or perſons whatſoever in any of his Majeſty's courts at *Weſtminſter*, it ſhall and may be lawful for ſuch Court reſpectively, upon motion then made, to provide and award ſuch writ or writs in the nature of a *mandamus* or commiſſion, to the chief juſtice and judges of the ſupreme court of judicature for the time being, or the judges of the mayor's court at *Madras*, *Bombay*, or *Bencoolen*, as the caſe may require, for the examination of witneſſes as aforeſaid, and ſuch examination being duly returned, ſhall be allowed and read, and ſhall be deemed good and competent evidence at any trial or hearing between the parties in ſuch cauſe or action."

that the teſtimony of the *Serang* was indiſpenſably neceſſary to aſcertain whether the *Weſt India* voyage came within the contract made in *Bengal* or not.

EYRE Ch. J. It may perhaps be true, that theſe perſons were ill-adviſed in not applying to the *Eaſt India* Company, who might have taken them under their protection. If the Company had been apprized of the nature of their caſe, they never could have been treated as they have been. As it is, they have put themſelves into the hands of the gentleman who conducts their cauſe; and the queſtion for our conſideration is, Whether the preſent application is ſuch an one as we ought to grant for the furtherance of juſtice? One of the affidavits on which the rule was granted, ſtates it to be the uſage of the country trade of the *Eaſt Indies* for the captain to contract with a *Serang*, who undertakes to provide men at his own riſk, and receives the payment ſtipulated by the captain. If this were ſuch a contract, founded on this uſage, it might be a contract to be proved by evidence in *India*. With reſpect to the reſidence of the witneſſes in *India*, I really thought that the *Serang* was not only reſident there, but had never left it; and if we had not thought ſo we never ſhould have granted a rule to ſhew cauſe; but now it turns out, that he has not only been in *England*, but has lately quitted this country in company with the Defendant. The affidavits on which the rule was obtained did not inform us, what the voyage was on which the wages aroſe; we could not ſay with certainty that it was even a voyage out of the country trade. I took it for granted, becauſe it is a caſe familiar to me, that the *Eaſt India* Company had chartered a country trader to come to *England*, and return to *Bengal*, which is not uncommon under ſome particular preſſure or emergency. I thought that the contract in queſtion might have been conducted in this manner, and that the *Serang* (always ſuppoſing him to have been reſident in *India*) was the only perſon who could give evidence of it. Little did I dream of a caſe in which, under colour of a bargain not unuſual reſpecting country ſhips, theſe poor men had been dragged to the *Weſt Indies*, and that the wages now ſued for aroſe on a voyage to and from the *Weſt Indies* only. This part of the caſe was carefully kept back, and how the Defendant's agents could think themſelves at liberty to ſuppreſs this fact I am at a loſs to conceive. Is it poſſible to ſuppoſe that a uſage in the *India* country trade, or a contract made in *India* founded upon that uſage, could be intended to extend to ſuch a tranſaction as this, where the men have been taken to a different deſtination from that originally in view, and kidnapped, as it were, to the *Weſt Indies*, having had no idea that ſuch a voyage was to be included in the contract made in *Bengal*? As ſoon as the Court is informed of theſe circumſtances, it muſt ſee that it has not any juriſdiction whatever to grant the writ in queſtion. The cauſe of action did not ariſe in *India*. The only ground on which we could put off the trial is the abſence of a material witneſs; to do this, we muſt take the circumſtances of the caſe into conſideration, and inquire into the probability of the *Serang*'s return to *England*; but here we learn that he is but juſt departed from this country in company with the Defendant himſelf, having been here in his power ſince the commencement of the action. Beſides I much doubt whether we ſhould ever get the *mandamus* executed even if we had the power to grant it; the *Serang* is a mariner, and probably is gone elſewhere beyond the reach of thoſe to whom we might direct our writ. This is one of the groſſeſt ſuppreſſions of the real caſe that I ever ſaw in a court of juſtice, and I think therefore that the rule ſhould be diſcharged with coſts, to mark the diſapprobation of the Court as much as poſſible.

Per Curiam, Rule diſcharged with coſts.

The KING *v.* FULLER.

In an indictment on 37 *Geo.* 3. *c.* 70. it is ſufficient to charge an *endeavour* to incite, &c. without ſpecifying the means employed.

Under a charge that *A.* endeavoured to incite *B.* to mutiny, being a ſoldier, knowledge of *B.*'s being a ſoldier is implied. The word *adviſedly* in ſuch a caſe is equivalent to *ſcienter*.

Semb. That if one *endeavour* compriſe two ſeparate offences, a count in an indictment charging that *endeavour* may contain thoſe two offences.

RICHARD *Fuller* was indicted at the *Old Bailey* ſeſſions in *July* laſt, on 37 *Geo.* 3. *c.* 70. (*a*)

The indictment ſtated, That *Richard Fuller* being a wicked and evil diſpoſed perſon, after the paſſing of a certain act of parliament made in 37 *Geo.* 3. intitled, " An act for the better prevention

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(*a*) The preamble of that act ſtates, " That whereas divers wicked and evil diſpoſed perſons, by the publication of written or printed papers, and by malicious and adviſed ſpeaking, have of late induſtriouſly endeavoured to ſeduce perſons ſerving in his Majeſty's forces by ſea and land from their duty and allegiance to his Majeſty, and to incite them to mutiny, and diſobedience;" it then enacts, " that any perſon who ſhall maliciouſly and adviſedly endeavour to ſeduce any perſon or perſons ſerving in his Majeſty's forces by ſea or land, from his or their duty and allegiance to his Majeſty, or to incite or ſtir up any ſuch perſon or perſons to commit any act of mutiny, or to make or endeavour to make any mutinous aſſembly, or to commit any traiterous or mutinous practices whatſoever, ſhall, on being legally convicted of ſuch offence, be adjudged guilty of felony, and ſhall ſuffer death as in caſes of felony without benefit of clergy."

and puniſhment of attempts to ſeduce perſons ſerving in his Majeſty's forces by ſea or land, from their duty and allegiance to his Majeſty, or to incite them to mutiny or diſobedence," and whilſt the ſaid act continued and was in force, to wit, on, *&c.* at, *&c.* feloniouſly did maliciouſly and *adviſedly endeavour* to ſeduce *Matthew Lowe*, he the ſaid *Matthew Lowe* then and there being a perſon ſerving in his Majeſty's forces by land, from his duty and allegiance to his ſaid Majeſty, *contra formam*, *&c. contra pacem*, *&c.*

The 2d count ſtated, That he feloniouſly did maliciouſly and *adviſedly endeavour* to incite and ſtir up the ſaid *Matthew Lowe*, he the ſaid *Matthew Lowe* then and there being a perſon ſerving in his ſaid Majeſty's forces by land as aforeſaid, to commit an act of mutiny, and to commit traiterous and mutinous practices, *contra formam*, *&c. contra pacem*, *&c.*

The priſoner was convicted; but objections being taken in arreſt of judgment, and referred to the twelve judges, they were argued in this term (*abſente Buller* J.) in the Exchequer chamber.

Gurney for the priſoner. 1ſt, The indictment does not ſtate in what manner and by what means the priſoner endeavoured to ſeduce *Matthew Lowe* from his duty and allegiance, as charged in the firſt count, and to incite him to commit an act of mutiny, and to commit traiterous and mutinous practices as charged in the ſecond count. 2dly, The indictment does not aver that the priſoner knew *Matthew Lowe* to be a perſon ſerving in his Majeſty's forces by land. 3dly, The ſecond count comprehends two diſtinct offences, which ought to have been charged in ſeparate counts.

1ſt, The preamble of the act recites the miſchief for which it provides a remedy; and ſtates, that the miſchief had been effected in two ways; by the publication of written or printed papers, and by malicious and adviſed ſpeaking. In this caſe, which occurred only two days after the act paſſed, the miſchief was attempted in the firſt mode, namely, by publiſhing and delivering two ſeditious hand-bills: thoſe hand-bills then ought to have been ſet out in the indictment, the publication of which to *Matthew Lowe* was the act done, that conſtituted the *endeavour* charged. The priſoner had not ſufficient notice, from this indictment, of the charge he was to encounter. He may have ſuppoſed that the evidence againſt him would conſiſt of converſation, and have been prepared to repel that, when in fact it conſiſted of the publication of papers, which he was not prepared to repel. Or he might have been prepared to meet evidence of the publication of

papers,

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papers, and have been ſurpriſed by evidence of converſation. Poſſibly alſo, the grand jury may have found the bill on evidence of malicious and adviſed ſpeaking, and the petit jury have given their verdict on evidence of the publication of ſeditious papers: in which caſe the priſoner will not have had the advantage of the concurrent opinion of the two juries. By analogy to other caſes it will appear, that the certainty which this indictment wants has been held to be neceſſary. In indictments for procuring money, &c. by falſe tokens, on 33 *Hen.* 8. *c.* 1. it is not ſufficient to purſue the words of the act, and aver that the Defendant "did falſely and deceitfully obtain poſſeſſion of money, &c. by means of a falſe token," but the indictment muſt ſtate what he did obtain, and what falſe token he employed; and for this reaſon, that the Defendant may be appriſed of the charge he is to meet. *Rex* v. *Munoz*, 2 *Str.* 1127. On the ſame principle the ſame rule has been laid down in the caſe of indictments under 30 *Geo.* 2. *c.* 24. for obtaining money or goods by falſe pretences. The *King* v. *Maſon*, 2 *T. R.* 581. In *Hawk. P. C. lib.* 2. *c.* 25. *ſ.* 57. it is ſaid, "That an indictment finding that a perſon hath feloniouſly "broken priſon, without ſhewing the cauſe of his impriſonment, "&c. by which it might appear that it was of ſuch a nature "that the breaking might amount to felony is inſufficient; alſo "indictments againſt perſons for refuſing to be ſworn conſtables "after they had been *legitimo modo electi*, have been quaſhed, for "not ſhewing the manner of the election, that it might appear to "have been ſuch as obliged the Defendants to have undertaken "the office." *Rex* v. *Harpur*, 5 *Mod.* 96. In *Davy* v. *Baker*, 4 *Burr.* 2471. which was an action on 32 *Geo.* 2. *c.* 24. for preventing bribery at elections, judgment was arreſted becauſe the declaration averred that the Defendant "did receive a gift or reward," without ſpecifying what.

2dly, It never could be the intention of the Legiſlature to puniſh with death an act of this nature, unleſs the man who was guilty of it *knew* that the perſon whom he was endeavouring to ſeduce or incite came within the meaning of the ſtatute. If it ſhould be thought that a feeble preſumption repels this objection as far as regards the ſecond count, becauſe it may be ſaid that a man could not be incited to an act of mutiny, who was not in his Majeſty's military or naval ſervice, and *known* to be ſo by the priſoner; yet the 1ſt count, which only charges an endeavour to ſeduce *Matthew Lowe* from his duty and allegiance to his Majeſty, affords no preſumption of that kind. Allegiance is equally due from all ſubjects, and therefore the priſoner may have done all that is charged in this count, without *knowing Matthew Lowe* to be a ſoldier. However, even as to the 2d count, the objection is fatal; for in capital caſes the want of ſpecific averments is not to be ſupplied by implication. The word "adviſedly" means nothing more than deliberately, and cannot be held equivalent to the word "knowingly."

3dly, The act creates four diſtinct offences. 1ſt, Endeavouring to ſeduce a perſon ſerving in his Majeſty's forces by ſea or land from his duty and allegiance. 2dly, Endeavouring to incite ſuch perſon to an act of mutiny. 3dly, Endeavouring to incite him to make or endeavour to make a mutinous aſſembly. 4thly, Endeavouring to incite him to commit any traiterous or mutinous practice. If two of theſe offences can be charged in one count, ſo may all four; or even forty, if the ſtatute had created ſo many, however inconſiſtent they might be. Beſides, this is a caſe in which the Judges will hold the Crown to a ſtrict definite mode of charge; more ſo even than in the caſes cited, as this is a capital felony: perhaps more ſo ſtill, becauſe this is a temporary ſtatute, and a meaſure of extraordinary rigour.

Abbott on the part of the Crown. The firſt objection, which is the moſt material, I ſhall conſider laſt, and proceed to the ſecond. It is ſtated in both counts, that the priſoner did *adviſedly* endeavour to ſeduce or to ſtir up *Matthew Lowe* being a ſoldier. Now the word *adviſedly* is at leaſt of as ſtrong import as the word *ſcienter*, and that has been held ſufficient in ſimilar caſes. *Hawk. lib.* 2. *c.* 25. *ſ.* 67. *Rex* v. *Thomſon*, 2 *Lev.* 208. *Rex* v. *Lawley*, *Fitz.* 122. 263. 2 *Str.* 904. in which laſt caſe the words "knowing *I. C.* to have been indicted," were held equivalent to an averment that he had been indicted; for if he had not, the Defendant could not have known that he had been. And this furniſhes another reaſon for ſupporting the laſt count; for a man cannot *adviſedly* incite a ſoldier to mutiny, unleſs he knows him to be a ſoldier. So in a late caſe of *Rex* v. *Tilly*, *O. B. S. June* 1796, (*a*) where the indictment charged that the priſoner was aiding and aſſiſting to one *Idſwell* in an attempt to make his eſcape; that was held, on a reference to the Judges, a ſufficient averment of *Idſwell's* having attempted to eſcape. In indictments for ſeducing artificers it is never uſual to aver that the Defendant knew the perſon ſe-

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(*a*) Vid. *Seſſions Papers*, p. 720.

duced to be an artificer. The *King* v. *Myddleton*, 6 *T. R.* 739. With reſpect to the 3d objection, I ſhall not argue that each of the four offences ſaid to be created by the act would not be a felony. But ſuppoſe that the priſoner had endeavoured to incite *Matthew Lowe* to all the acts mentioned in the ſtatute, and that ſuch endeavour had been at one and the ſame time; in that caſe, as far as the priſoner was concerned, his act would have been ſingle, for the ſubſequent conduct of the perſon incited is a diſtinct conſideration. The priſoner is not charged as an acceſſory to any thing already committed, but only with an endeavour to incite to the commiſſion of ſome future offence. If the endeavour was but one act, (and it muſt be ſo taken now,) the indictment is right, for it cannot charge the offence more accurately than it took place. If the act was general it cannot be made particular by the indictment. It is no objection, after verdict, that an indictment contains ſeveral felonies, if each is diſtinctly charged. *Young* v. the *King*, in error, 3 *T. R.* 98. Though the offences in that caſe were charged in different counts, yet the doing ſo is only matter of convenience. But in truth this was but one endeavour, conſtituting but one act.

The 1ſt objection only remains to be conſidered. If it were neceſſary in caſes of this ſort to ſtate the various means employed, it would be impoſſible ſo to frame an indictment as to make it tally with the evidence. The caſe in *Str.* 1127. is the only one decided on 33 *H.* 8. *c.* 1. and on that was founded the deciſion in the *King* v. *Maſon*, 2 *T. R.* 581. No one of the four caſes referred to in *Strange* was on that ſtatute, and therefore they are not in point: and the indictment in the principal caſe, as far as we can collect from the report in *Strange*, could not have been good, as it ſeems to have omitted a material word. The preamble of 33 *H.* 8. which is referred to in the enacting clauſe, mentions "privy tokens;" now an indictment, which is more comprehenſive than the meaning of a ſtatute, even though it purſues the words of it, is bad (a). The ſame principle goes in anſwer to the *King* v. *Maſon*; for all falſe pretences are not within 33 *Geo.* 2. *c.* 24. as appears by the opinion of Lord *Kenyon* in *Young* v. the *King*, in error. But there can be no ſuppoſeable caſe of an *endeavour* to incite a ſoldier to mutiny, *&c.* which is not within 37 *Geo.* 3. As to *Davy* v. *Baker*, the declaration ſtated "gift *or* reward," whereas it ſhould have averred which of the two it was. What is within the meaning of "*legitimo modo electus*," *Hawk. lib.* 2. *c.* 25. *ſ.* 57. is a queſtion of law, and the manner of election ought to be ſhewn ſince no forfeiture can ariſe but on a lawful election.

(a) *Hawk. P. C. lib.* 2. *c.* 25. *ſ.* 111.

The words "mutiny," and "mutinous and traiterous practices," uſed in the 37 *Geo.* 3. are taken from 22 *Geo.* 2. *c.* 33. relating to the navy, and from the annual mutiny act, and the articles of war in purſuance thereof, which make thoſe offences puniſhable with death in ſoldiers and ſailors. The Legiſlature here ſtudiouſly ſelected the word "endeavour," as being of the largeſt and moſt general import. It mentions no particular modes of attempt, and no circumſtances accompanying the attempt, as neceſſary to conſtitute the crime. Nor is the body of the act to be reſtrained by the preamble, as it has no reference to it; but is rather to be extended to all caſes within the miſchief. The *King* v. *Robinſon*, *O. B. S. June* 1796 (*a*). To determine the offence laid in this indictment by the word "endeavour," not to be the offence mentioned in the ſtatute, would be to alter, not to conſtrue the ſtatute. Certainly "endeavour" does imply an act done; it holds a middle place between compaſſing and actual perpetration; it is an attempt to carry the operations of the mind into effect. There are many inſtances of indictments as large as the preſent. In conſpiracy, which is an offence known to the law *eo nomine*, it is not neceſſary to ſtate the means employed. *Rex* v. *Stirling*, 1 *Lev.* 125. *Rex* v. *Kinnerſley* and another, 1 *Str.* 193. This was again decided in *Rex* v. *Eccles*, *M.* 24 *G.* 3. where *Willes* J. referred to the caſe in *Strange*. In caſes of ſubornation of perjury, though moſt of the old precedents ſtate a promiſe of money, *Tremaine's P. C.* from 168. to 174. yet moſt of the modern ones only ſtate the endeavour to ſuborn. *Cr. Circ. Comp.* 586. 588. *Cr. Circ. Aſſ.* 329. So in averring the offence of aiding priſoners to eſcape, it is ſufficient to ſay, "aiding and aſſiſting." *Rex* v. *Tilly*. The form of charging an acceſſory before the fact is, "that he did incite, move, procure, aid, and abet." *Cr. Circ. Comp.* 124. Lord *Sancker*'s caſe, 9 *Co.* 116. Indictments for ſeducing artificers, merely purſue the words of the ſtatute (*b*). The *King* v. *Myddleton*, 6 *T. R.* 739. So in maintenance under 32 *H.* 8. *c.* 9. *Sav.* 41. *Co. Ent.* 163. *b.* *Rex* v. *Price*, *Tremaine's P. C.* 177. In forgery with intent to defraud, the fraud may be effected in various ways; yet in *Rex* v. *Powel*, 2 *Bl.* 727. *Leach*, 72. it was held ſufficient to aver a general intent to defraud.

(*a*) Vid. *Seſſions Papers*, 722.

(*b*) 23 *Geo.* 3. *c.* 13.

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At the *Old Bailey* Seſſions in the *December* following, *Perryn* Baron delivered the unanimous opinion of the Judges as follows:

In this caſe three objections were taken in arreſt of judgment.

1ſt, That the indictment does not ſtate in what manner, and by what means the priſoner did *endeavour* to ſeduce, to entice, and to ſtir up *Matthew Lowe* from his duty and allegiance.

The 2d objection was, that it ſhould have been averred in the indictment that the priſoner *knew* that *Matthew Lowe* was a ſoldier.

The 3d objection was, that the ſecond count of the indictment comprehended two diſtinct offences, *viz.* an endeavour to ſeduce, entice, and ſtir up, to commit mutiny, and an endeavour to ſeduce, entice, and ſtir up to commit traiterous and mutinous practices.

The 1ſt objection, namely, that the indictment does not ſhew in what manner and by what means the priſoner did endeavour to ſeduce, to entice, and ſtir up, was ſupported by a ſuppoſed analogy to the rule, and the form of indictments in the caſe of falſe tokens and falſe pretences: and it was argued, that the ſtatute upon which the preſent indictment is founded ſuppoſes a manner and means of endeavouring, by publiſhing papers and by malicious and adviſed ſpeaking: and therefore that the means uſed ſhould have been ſet forth.

The anſwer to this objection is, that an endeavour to ſeduce, to entice, and to ſtir up, though a concluſion from an infinite variety of facts and circumſtances is but a concluſion of fact, is itſelf a fact, admitting of no definition or deſcription; that the fact is fully expreſſed by the mere force of the word "endeavour," and can only be expreſſed by that word, like the words, "conſpire, maintain, aid, and abet," which in indictments for the offences of conſpiracy, maintenance, &c. do ſufficiently expreſs the offences charged in the indictment, without circumlocution, and without ſhewing in what manner and by what means the conſpiracy, maintenance, aiding, and abetting &c. were produced. We are therefore of opinion that this objection is not ſufficient whereupon to arreſt this judgment.

The 2d objection was, that it ſhould have been averred in this indictment that the priſoner *knew* that *Mathew Lowe* was a ſoldier.

The argument urged in ſupport of this objection, that the priſoner could not be guilty of the offence charged unleſs he *knew* that the man upon whom he practiſed was a ſoldier, ſuggeſts one anſwer to this objection, *viz.* that knowledge is neceſſarily included in the charge of endeavouring to ſeduce, &c. Another full and ſatisfactory anſwer is, that the word "adviſedly" is in the indictment, which is at leaſt equivalent to the word *ſcienter*. This objection therefore cannot hold.

The 3d objection is, that the ſecond count of this indictment comprehends two diſtinct offences.

Probably it will be found to be a ſufficient anſwer to this objection, that (though this charge might have been branched into ſeparate offences) the whole may be but the parts of one fact of endeavour; which muſt be ſtated as it is. But in the circumſtances in which this priſoner now ſtands convicted upon the firſt count of this indictment, to which no ſufficient objection has been taken, and upon which therefore judgment muſt be pronounced againſt him, it is not abſolutely neceſſary that the Judges ſhould decide upon this laſt objection, and therefore I forbear to enter further into the conſideration of it.

Upon the whole, we are of opinion that there is no ground to arreſt the judgment, and that ſentence ſhould paſs upon the priſoner.

The King *v.* Brady, Kierman, and Rooke.

An exciſe officer ſeizing ſoap in the execution of his office *at any diſtance from the ſea*, is within the protection of 24 *Geo.* 3. *Seſ.* 2. *c.* 47. *ſ.* 15.

The indictment ſtated that the Defendants after the 1ſt day of *October* 1784, to wit, on, &c. with force and arms, at the liberty of *Havering Alte Bower* in the county of *Eſſex*, in and upon *Charles Wakely*, then and there being an officer of our lord the King, in the ſervice of the exciſe of our ſaid lord the King duly conſtituted and appointed, and then and there being *on ſhore in the due execution of his office and duty*, as ſuch officer as aforeſaid, in ſeizing and ſecuring to and for the uſe of our ſaid lord the King, a large quantity, to wit, 500 pounds weight of ſoap, which ſaid ſoap was then and there liable to be ſeized by the ſaid *Charles Wakely* as ſuch officer as aforeſaid; and then and there being in the peace of God, and of our ſaid lord the King, unlawfully and violently did make an aſſault, and him the ſaid *Charles Wakely*, ſo being then and there *on ſhore in the due execution of his ſaid office and duty* in manner aforeſaid, unlawfully and forcibly did hinder, oppoſe, and obſtruct, to wit, at, &c. and other wrongs, &c. *contra formam*, &c.

2d Count. For aſſaulting the ſaid *Charles Wakely*, and for oppoſing and obſtructing him in the execution of his office generally.

3d Count. The ſame as the 2d, omitting the aſſault.

This came on to be tried at the *Old Bailey* Seſſions in *September* 1797, before the Lord Chief Baron and *Aſhhurſt* J. when the Defendants were found guilty on the following facts:

Two of the Defendants, *Kierman* and *Rooke*, had taken a quantity of ſoap out of a copper in the manufactory of an entered ſoap-boiler near *Rumford* in *Eſſex*, without the preſence of an exciſe officer, and were carrying it away in a cart, in order to conceal it, when *Wakely* an exciſe officer attempted to ſeize it; on which he was aſſaulted by the Defendants *Brady*, *Kierman*, and *Rooke*. *Wakely* had no warrant.

Several points having been reſerved at the trial for the opinion of the twelve Judges, at the inſtance of *Brady*'s counſel, they were this day argued (abſente *Buller* J.) in the *Exchequer Chamber*.

Runnington Serjt. for the Defendant *Brady*. This indictment is framed on 24 *Geo.* 3. *Seſſ.* 2. *c.* 47. *ſ.* 15. the preamble (*a*) of which ſhews that it was made to prevent ſmuggling. The 1ſt objection therefore is, that the offence charged in this indictment, being within the exciſe laws, does not come within either the letter or the ſpirit of an act to prevent ſmuggling. The cuſtom and the exciſe have each their own ſyſtem of poſitive law, within the letter of which a Defendant muſt be proved to have offended. Beſides, nothing is ſaid in the indictment with reſpect to the diſtance (*b*) from the ſea, at which the offence was committed: "being on ſhore" are the words employed in all the counts. It is

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(*a*) The preamble runs thus. "Whereas the laws heretofore made and now in force to prevent the clandeſtine importation and running of prohibited goods and goods liable to the payment of duties into this kingdom, have not been ſufficient to anſwer the good purpoſes thereby intended, that pernicious practice having of late been greatly increaſed and carried on by large armed veſſels at ſea, and by numerous gangs of ſmugglers upon land, with great violence, in defiance of thoſe laws, to the great loſs and prejudice of the public revenue, the detriment of the fair trader, and the endangering the lives of the officers of the revenue acting in the due execution of their duty," *&c.*

(*b*) By *ſ.* 15. "If any officer or officers of his Majeſty's navy, or in the ſervice of the cuſtoms or exciſe, being on ſhore or going on board, or being on board, or returning from on board any ſhip boat or veſſel within the limits of any of the ports of this kingdom, or within four leagues from the coaſts thereof, ſhall be hindered, oppoſed, obſtructed, or aſſaulted, in the due execution of his or their office or duty by any perſon or perſons whatſoever, either in the day-time or night," all perſons ſo hindering, *&c.* being convicted on indictment ſhall be ſentenced to hard labour or impriſonment not exceeding three years.

true that this is an offence indictable at common law; but as the proſecutor has proceeded on 24 *Geo.* 3. *Seſſ.* 2. *c.* 47. and the trial has been had out of the county where the offence was committed under *ſ.* 17. no advantage can be taken of that circumſtance. 2dly, Suppoſing this offence to be within 24 *Geo.* 3. *Seſſ.* 2. *c.* 47. yet *ſ.* 15. of that ſtatute is virtually repealed as far as relates to the commodity in queſtion, by *c.* 48. *ſ.* 10. of the ſame year, which impoſes a penalty of 50 *l.* on all perſons obſtructing an officer of exciſe in the execution of the powers given to him for ſecuring the duties upon ſoap. That an act may be virtually repealed appears from *Rex* v. *Cater*, 4 *Burr.* 2026. and *Rex* v. *Davis*, *Leach*, 1 *Ed.* 252. [*Heath* J. There the ſtatutes by which the former were held to be repealed, were paſſed in ſubſequent ſeſſions; where both ſtatutes are paſſed in the ſame ſeſſion, the latter is only explanatory.] 3dly, By 23 *Geo.* 2. *c.* 21. *ſ.* 34. and 5 *G.* 3. *c.* 43. *ſ.* 20. exciſe officers are directed to procure a warrant previous to their entering *any place whatſoever* for the purpoſe of ſeizing ſoap hid or concealed. *Wakely* therefore ſhould have had a warrant in this caſe, and not having been cloathed with the authority required, he was not obſtructed "in the due execution" of his duty.

Lord Kenyon Ch. J. Eyre Ch. J. and Macdonald Ch. B. expreſſed themſelves very clearly of opinion, that this laſt point could not be ſupported.

Knowlys for the proſecution. Smuggling is any attempt to defraud the revenue of any duties; and ſmugglers by land as well as by ſea, were within the contemplation of 24 *G.* 3. *Seſſ.* 2. *c.* 47. The words uſed in *ſ.* 15. of that act are "officers of the cuſtoms or exciſe, *&c.* in the due execution of their duty," *&c.* This includes the whole range of that duty which belonged to exciſe officers before the paſſing of the act; and 10 *Ann.* *c.* 19. *ſ.* 19. having empowered officers to ſeize ſoap, this duty was then known to the Legiſlature. Theſe laws were all made *in pari materiâ* for the benefit of the revenue. The words "on ſhore," uſed in *ſ.* 15. of 24 *G.* 3. *Seſſ.* 2. *c.* 47. are equivalent to "on land;" and ſo it was held by *Wilſon* J. in the caſe of the *King* v. *England*, *O. B. S.* 1788, (only four years after the paſſing of the act;) on this objection being taken, who ſaid, the words "on ſhore" were only inſerted in contradiſtinction to "on board a ſhip," and to provide againſt the officers being obſtructed in either ſituation. The above deciſion has often been cited and never hitherto called in queſtion.

The King *v.* Brady and others.

At the *Old Bailey* Seſſions in the *December* following, *Groſe* J. delivered the unanimous opinion of the Judges:

That the words "on ſhore," uſed in the 24 *G.* 3. *Seſſ.* 2. *c.* 47. *ſ.* 15. mean *on land*, and that an officer of exciſe ſeizing ſoap in the execution of his office at an inland place, at any diſtance from the ſea, is within the ſcope and protection of that act.

Mr. Juſtice *Buller* was abſent from the 10th of *November* to the end of the term, from indiſpoſition.

THE END OF MICHAELMAS TERM.

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CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

JONES *v.* CLAY.

Jan. 29th.

Le Blanc Serjt. having on a former day moved for a rule to ſhew cauſe why the Plaintiff, who had proceeded againſt the Defendant by action and indictment for the ſame aſſault, ſhould not be directed to make his election to purſue either the one or the other, the Court refuſed the rule, ſaying, the Defendant might apply to the Attorney General for a *nolle proſequi*, if there was any thing vexatious in the proceeding by indictment.

If a party proceed againſt a Defendant by action and indictment for the ſame aſſault, the Court will not compel him to make his election.

Le Blanc now ſtated, that the Attorney General having been applied to for the above purpoſe, had informed the Defendant's agents, that ſince he had been in office it had been a rule with him never to grant a *nolle proſequi* in ſuch caſes (*a*).

The Court doubted if ſuch an application had ever been allowed, ſaying, that the fine to the king and the damages to the party were perfectly diſtinct in their nature, and that if they did what was

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(*a*) Vid. tam. *Rex* v. *Fielding* Eſq. 2 *Burr.* 719. where it appears to have been conſidered by the Court of *K. B.* as the uſual courſe.

deſired of them in this inſtance, they muſt lay it down as a general rule, that parties muſt always make their election.

Le Blanc took nothing by his motion.

Jan. 31ſt.

Galton Demandant *v.* Harvey Tenant.

The Court will not permit the *miſe* joined in a writ of right to be tried by a jury inſtead of the grand aſſize, though both parties deſire it.

Cockell Serjt. having obtained a rule to ſhew cauſe why the *miſe* joined in a writ of right between theſe parties ſhould not be tried by a jury of the county of *Dorſet* inſtead of the grand aſſize;

Williams Serjt. for the tenant conſented; but ſtated that the attorney for the demandant had promiſed to make certain admiſſions at the trial in caſe the tenant would conſent, and deſired that the rule might be made abſolute on thoſe terms.

Eyre Ch. J. When this was firſt moved the Court felt an objection which I have not yet got over. You deſire to alter the proceedings in a writ of right by conſent. That form of action I hold to be *ſtrictiſſimi juris* at the preſent day: and I do not feel any inclination to give aſſiſtance to a courſe of proceeding which goes to diſturb a poſſeſſion of 50 or 60 years. If you will have a writ of right you muſt follow the courſe marked out by the law. This is the inclination of my mind at preſent, though I do not mean to ſay that if my Brothers ſhould think it right to grant the rule that I ſhall oppoſe it.

Buller J. expreſſed himſelf of the ſame opinion, and ſeemed to think that other inconveniencies might ariſe if the rule were granted, from the want of proceſs to compel the witneſſes to attend, and of power to proſecute them in caſe of perjury committed.

Rooke J. of the ſame opinion.

Rule diſcharged.

Feb. 1ſt.

Goodill *v.* Brigham.

Deviſe in fee to a feme covert, with a power to diſpoſe of the eſtate without the controul of her huſband; held that ſuch a power was void, as being inconſiſtent with the fee given to her in the firſt inſtance, and that ſhe could not convey without fine.

Replevin for taking cattle.

Cognizance as bailiff of *C. Rogers* "becauſe he ſays that one *John Poad* long before the ſaid time when &c. to wit on

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&c. was ſeiſed in his demeſne as of fee of and in the ſaid farm and tenement with the appurtenances in which &c. And being ſo thereof ſeiſed he the ſaid *John Poad* long before the ſaid time when *&c.* to wit on *&c.* at *&c.* in due form of law made his laſt will and teſtament in writing, and thereby gave and deviſed unto his ſiſter *Eſther Rogers* her heirs and aſſigns for ever the ſaid farm and tenement in which *&c.* with the appurtenances. And the ſaid *John Poad* by his ſaid will declared that his will further was that what eſtate and effects he had thereby given to his ſaid ſiſter ſhould be fully veſted in her notwithſtanding her coverture, and that ſhe might give ſell and diſpoſe of the ſame as ſhe ſhould think proper, and alſo give acquittances and other diſcharges ſo as not to be under the controul of her own huſband the ſaid *C. Rogers*, which ſaid huſband ſhould not intercede or meddle with any of the eſtate or effects thereby given to his ſaid ſiſter. And the ſaid *John Poad* afterwards and before the ſaid time when *&c.* to wit on *&c.* at *&c.* died ſo ſeiſed of his ſaid eſtate of and in the ſaid farm and tenement in which *&c.* with the appurtenances, after whoſe death to wit on *&c.* the ſaid *C. Rogers* and *Eſther* his wife by virtue of the ſaid will entered into the ſaid farm and tenement in which *&c.* with the appurtenances, and became ſeiſed thereof in their demeſne as of fee in right of the ſaid *Eſther*, and being ſo ſeiſed *&c.*" It then ſtated, "that *C. Rogers* and *Eſther* his wife by *leaſe and releaſe* conveyed the premiſes to *P. Merry* in fee to the intent and purpoſe that *C. Rogers* might receive an annuity or rent-charge of 40*l.* for his life payable half-yearly with power of diſtreſs; that *P. Merry* by virtue thereof became ſeiſed of the premiſes in fee ſubject to the above annuity, and the ſaid *C. Rogers* became ſeiſed in his demeſne as of freehold for life of the ſaid annuity; that 140*l.* for ſeven half-yearly payments were in arrear. Wherefore *&c.*"

Plea in bar that *Eſther Rogers* died before the firſt half-yearly payment of the annuity became due.

To this there was a general demurrer and joinder.

Shepherd Serjt. for the Avowant. The queſtion is, Whether *Eſther Rogers* could convey the premiſes in diſpute without levying a fine, the eſtate by the words of the will having been given to her in fee, with a power to diſpoſe of it without the controul of her huſband? The diſtinction taken in the books is this: If a power be given to a married woman, and an eſtate be alſo given to her by the ſame will, yet if the power does not flow from the eſtate, ſhe may convey without fine; though if the power ariſe from the mere poſſeſſion of the eſtate it is otherwiſe. In *Co. Lit.* 112, *a.* it is ſaid "If *ceſtuy que uſe* had deviſed that his wife ſhould ſell his land, and made her executrix and died, and ſhe took another huſband, ſhe might ſell the land to her huſband, for ſhe did it in *auter droit*, and her huſband ſhould be in by the deviſor." It is true that the power there was to ſell, but the power in this caſe being ſpecifically given by the will is as diſtinct as if given for the purpoſe of ſale; and *Eſther Rogers* muſt be conſidered in the ſame light as any other perſon executing a power. 1 *Roll. Abr. p.* 329. *pl.* 10. *Bro. Abr.* tit. *Cui in Vitâ, pl.* 15. The diſability of a feme covert to convey by deed is the ſame as to diſpoſe by will: now in *Gibbons* v. *Moulton*, *Rep temp.* Sir *H. Finch* 346. the Court held a power to will given to a feme covert to be diſtinct from an eſtate given to her by the ſame inſtrument. In *Daniel* v. *Ubley*, Sir *W. Jones* 137. *Latch.* 9. 39. 134. *Ubley* deviſed his houſe "to *Agnes* his wife to diſpoſe of at her will and pleaſure, and to give to ſuch of his ſons as ſhe ſhould think beſt:" *Agnes* having married again, and enfeoffed *William* the ſecond ſon in fee, and made livery, the conveyance was held good: nor does it make any difference that a number of perſons were pointed out in that caſe from whom the feme covert was to ſelect one, and that in the preſent caſe *Eſther Rogers* might ſelect whom ſhe pleaſed. Wherever the power of appointment is diſtinct from the eſtate, a feme covert may be conſidered as a feme ſole. *Grigby* v. *Cox*, 2 *Vez.* 517. 1 *Bro. Chan. Caſ.* 20. *Dighton* v. *Thomlinſon*, *Com.* 194. The teſtator in this caſe has given a power to *E. Rogers* which ſhe never could have derived from the mere poſſeſſion of the eſtate. A power to a feme covert to make leaſes without her huſband, or to convey a reverſion after her own eſtate for life is good, becauſe it gives a right to do that which ſhe could not do without it. *Bayley* v. *Warburton*, *Com.* 494. *Powell on Powers* 34. *Doe* v. *Strachan*, *Cowp.* 208. So here an eſtate having been deviſed to a woman already married, who had no right to convey without her huſband, unleſs by virtue of the power ſpecifically given; ſhe does in conſequence of that power acquire a right to do ſomething which by operation of law ſhe would not have had. It is manifeſt that the teſtator intended to give an eſtate to *E. Rogers* free from the controul of her huſband; but if the Court decide againſt this power ſhe will not have an eſtate free from the controul of her

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huſband, for if a fine be neceſſary he muſt join in it, and in caſe of a child born he would be tenant by the curteſy. In order to give effect to the teſtator's intent, the Court may conſtrue this deviſe to be to ſuch uſes as the wife ſhall appoint, and until that appointment to herſelf and her heirs, or an eſtate to her for life, remainder to ſuch uſes as ſhe ſhall appoint, remainder over to her heirs; in either of which caſes ſhe would take a fee-ſimple conditional, and might therefore convey without fine. *Co. Lit.* 216. and *n.* 119. *ed.* 15.

Le Blanc Serjt. contrà. 1ſt, As to the intention of the deviſor, it is manifeſt that he wiſhed to relieve *E. Rogers* from the controul of her huſband. Now the inſtrument in queſtion was made for the benefit of the huſband and immediately under his controul, being to ſecure an annuity to him for life. 2dly, The word "power" in law may be thus defined, *viz.* an authority given to one perſon to be exerciſed over the eſtate of another; but there is no caſe where an authority to be exerciſed over the eſtate of the donee has been conſtrued to be a power. The party taking the eſtate under the power has always been held to be in by the conveyance of the donor. In the caſe put *Co. Litt.* 112. 1 *Roll. Abr. p.* 329. *pl.* 10. the wife would have a mere naked authority without any intereſt in the eſtate over which the power is to be exerciſed. It is true that though a certain intereſt be given to the wife, yet ſhe may execute a power collateral to the intereſt, as in the caſe of a life-eſtate given to a feme covert, with power to diſpoſe of it by will; the power there being collateral to the intereſt, ſince it extends to a part of the eſtate to which the intereſt does not. Thus in *Gibbons* v. *Moulton*, an annuity was given for the life of *A. B.* which might laſt longer than the life of the deviſee, and therefore the deviſee was enabled to diſpoſe of the remainder. In *Daniel* v. *Ubley* it was the opinion of *Jones*, that the wife took an eſtate for life, with power to convey the remainder to ſuch of the ſons of the deviſor as ſhe pleaſed, or that ſhe took a fee-ſimple conditional, in which laſt caſe as well as in the firſt the conveyance was good. *Bro. Abr.* tit. *Cui in vitâ*, *pl.* 15. With reſpect to *Dighton* v. *Tomlinſon*, the wife there had only an eſtate for life, with a power over that part of the eſtate which was not diſpoſed of. The caſes in Chancery are not of authority here, ſince that Court cures any difficulty ariſing from legal diſabilities. This is like the attempt in *Habergham* v. *Vincent*, 5 *Term Rep.* 92. to execute a deviſe of lands under a power without three atteſting witneſſes, or like a

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deviſe of lands in tail with a reſtriction on the deviſee from ſuffering a recovery. The deviſor in this caſe has given to the wife as great an eſtate as poſſible, and ſuperadded a power to diſpoſe of it in a way which the law does not allow.

Eyre, Ch. J. It ſtruck me on reading this caſe, that it would be very difficult to ſuſtain the conveyance in queſtion: and when it was admitted in argument that this was a deviſe in fee-ſimple with a power ſuperadded I did not comprehend how that could be. My brother *Le Blanc* has argued the caſe very luminouſly and ſatisfactorily, and ſo as to convince me that a power is inconſiſtent with ſuch an eſtate. If we trace back the nature of uſes, it will be clear that this cannot be conſidered as a power. Powers are the modifications of the uſes of that eſtate, which a man has to diſpoſe of; and great latitude is allowed in making thoſe modifications. If a man employ the proper means, he may create all kinds of powers that are conſiſtent with, and within the extent of his fee-ſimple; and until his fee-ſimple is exhauſted, I know of no power, no diſtribution, (provided it do not violate the rules of law,) which could not be ſupported: as far as that goes the doctrine of powers is very intelligible. The power which any one creates muſt be exerciſed over his own eſtate; but when it has been exerciſed over that eſtate to the extent of that eſtate, that is, when he has given away the whole fee-ſimple, and the whole uſe of the fee-ſimple too, it ſeems to me that he is *functus officio*. What remains for him to do? All which he does beyond that goes to ſay in what manner the fee-ſimple ſhall be enjoyed by the donee, and is matter of direction intended by the donor to controul all the rules of law. When a deviſor gives an eſtate to a feme covert and attempts to relieve her from the diſability ariſing from her coverture, his eſtate being exhauſted, the law muſt controul her enjoyment of it. It is true that he may modify her enjoyment of the eſtate, as far as is within the uſe of the eſtate, as if he make a conveyance in fee to truſtees, and direct that the wife ſhall have the eſtate to her ſole and ſeparate uſe, and make a ſubſequent declaration to ſuch uſes as ſhe ſhall appoint, the uſes will wait upon that declaration, and as ſoon as any ſtep has been taken to execute the power, the uſes will receive that direction from the appointment which he intended that they ſhould receive. In that caſe the appointment under the power will enure as a limitation of thoſe uſes which he had a right to limit. But the preſent caſe ſeems quite beyond the ſcope of a power, and of all the rules of law which have prevailed with reſpect to the execution of powers. The deviſor has given a fee-ſimple to the wife to be enjoyed by her to her ſole and ſeparate uſe: what does the law ſay? The law ſays that a feme covert cannot take an eſtate to her ſole and ſeparate uſe. The deviſor ſhould have taken the neceſſary ſteps to carry his intent into effect: he ſhould either have deviſed the eſtate to truſtees with the uſes waiting on what he might authorize her to do, or he ſhould not have given her the whole fee: in either of which caſes this power might have been well executed. This appears to be the ſtate of the caſe on principle; and on authority there is nothing which goes to eſtabliſh that where there is a direct conveyance of an eſtate in fee-ſimple any uſe can be grafted upon it; much leſs a uſe of this nature, the object of which is to enable a feme covert to do what by law ſhe is diſabled from doing. All powers which can be given, muſt be part of the uſe of the fee-ſimple, and the moment that uſe is exhauſted, there can be no ſuch thing as annexing ſome new uſe, beyond all which the party himſelf had to give. I think therefore that the caſe is with the plaintiff.

Buller, J. If by tranſpoſing the clauſes of the will the Court can give effect to the whole will, they may do ſo, but they muſt be careful not to thwart the intention of the deviſor, by giving a different intereſt from what he intended. If by tranſpoſing the clauſes they could come to the concluſion that an eſtate for life only veſted in the feme covert, they might hold the power of appointment good; for in that caſe, this would be a deviſe of an eſtate for life to *E. Rogers* with a power to diſpoſe of the remaining intereſt being in another perſon. My brother *Le Blanc*'s definition of a power is certainly correct. It is an authority enabling one perſon to diſpoſe of the intereſt which is veſted in another. Let us ſee then if it be poſſible conſiſtently with the intention of the deviſor to confine the intereſt of *E. Rogers* to an eſtate for life. Nothing can be more poſitive than the expreſſions of the will which deſcribe the intereſt which *E. Rogers* is to take. The words are "to *E. Rogers* her heirs and aſſigns for ever," and not content with this the deviſor adds, "that what eſtate and "effects he had given to his ſiſter ſhould be fully veſted in her "notwithſtanding her coverture," &c. This deviſe is as explicit as poſſible, and creates in her a complete fee-ſimple. Then the power given is inconſiſtent with the eſtate, and we cannot reduce the latter to an eſtate for life, for we cannot vary the intereſt which the

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the deviſor has given. Suppoſe by tranſpoſing the clauſes we could conſtrue this to be a deviſe to ſuch perſons and uſes as *E. Rogers* ſhould appoint; and for want of ſuch appointment to her and her heirs. If the deviſe had ſtood thus, ſhe could have taken nothing till her death, or till her appointment. Now the deviſor clearly intended that ſhe ſhould take immediately: we cannot therefore make this conſtruction without doing actual violence to the will. The deviſor ſeems to have had two intentions which are inconſiſtent; one was, to give an eſtate in fee to *E. Rogers;* the other, to qualify it in ſuch a manner as that her huſband ſhould have no power over it; which laſt is contrary to the rules of law: the Court will therefore carry into effect the firſt intention, and reject the other. How does this caſe differ from an attempt to create a power of diſpoſing by will atteſted by one witneſs, or to deviſe an eſtate tail with a reſtriction on the deviſee from ſuffering a recovery? In this as well as in the caſes I have put, we can only ſay, the law will not allow of ſuch a diſpoſition.

Rooke, J. A point has ariſen from the circumſtances of this caſe which has never before been determined in a court of law; from which I infer, that ſuch an attempt has never before been made, or if made, has been deemed inſupportable. The law ſays, that a married woman ſhall not alienate without fine. If a man would give a fee-ſimple to a feme covert, with a power to alienate without fine, he muſt do it by means of truſtees. That has not been done in this caſe. When a man gives a fee-ſimple, he ſhall not be allowed to ſay, that ſuch fee-ſimple ſhall not be ſubject to all the reſtraints which the law impoſes upon it. The deviſor having given a fee-ſimple, he could add nothing to it, and conſequently the ſubſequent power is void. It has been ſaid, that poſſibly by our deciſion we ſhall defeat the intention of the deviſor; but if that intention be contrary to law, it does in fact defeat itſelf. It ſeems however to have been his intention, that the object of his bounty ſhould not act under the controul of her huſband. On the facts of this caſe, however, it appears that ſhe has acted under his controul, having conveyed an eſtate to her huſband jointly with him, and without the intervention of any legal authority.

Judgment for the Plaintiff.

BULL *v.* TILT.

A pardon if pleaded muſt be averred to be under the great ſeal.

ASSUMPSIT for wages.

Pleas. 1ſt, *Non-aſſumpſit.* 2dly, That the Plaintiff, before the time of the action commenced, was convicted of felony, and ſentence of tranſportation paſſed upon him.

Replication joining iſſue on the 1ſt plea. As to the 2d plea, "that after the ſaid conviction of the Plaintiff, and after the giving of the ſaid judgment in the ſaid plea mentioned to have been given againſt him as aforeſaid, and before the ſuing forth of the original writ of the Plaintiff in this behalf, (to wit,) on, &c. at, &c. our ſovereign lord the now king, in conſideration of the opinion of the judges of our ſaid lord the king in the Plaintiff's behalf, was graciouſly pleaſed to extend his gracious mercy unto the Plaintiff, and did then and there grant the Plaintiff his ſaid Majeſty's *free pardon* for the ſaid crime, of which the ſaid Plaintiff was ſo convicted, as in the ſaid plea is mentioned. And this, &c. Wherefore, &c."

To this there was a ſpecial demurrer, "for that the ſaid Plaintiff hath not in or by his ſaid replication alleged or ſhewn in what manner the ſuppoſed pardon therein mentioned was granted, or that the ſame was under the great ſeal of *Great Britain*; and alſo for that the ſaid Plaintiff hath not in or by his ſaid replication ſet forth or ſhewn the letters patent, if any, by which the ſaid pardon was granted, or brought the ſame into court here; and alſo for that the ſaid replication is, in other reſpects, uncertain, inſufficient, and informal."

Joinder in demurrer.

Kirby Serjt. being called upon by the Court to ſupport the replication, contended, that although the caſe of the *King* v. *Beaton*, 1 *Bl.* 479. was an authority to ſhew that a pardon is not good unleſs under the great ſeal, yet that it did not prove the neceſſity of averring that circumſtance; but on the contrary, that it muſt be implied from the Plaintiff's averment of his having received a *free pardon*, that it was under the great ſeal, ſince no other pardon is good (*a*).

EYRE Ch. J. I take it that every thing under the great ſeal muſt be pleaded *ſub pede ſigilli*, and that a pardon muſt be under the great ſeal is clear. However, that this may not be taken too

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(*a*) *The King* v. *Maximilian Miller*, 2 *Bl.* 797.

generally, I think it right to mention that under ſome ſtatutes the king's ſign manual actually carried into execution, and the conditions performed, may amount to a ſtatute pardon. But thoſe are exceptions not at all affecting this caſe.

Per Curiam, Judgment for the Defendant.

Palmer Serjt. for the Defendant.

Feb. 3d.

Sir W. Staines Knt. and Another, Sheriff of *Middleſex*, *v.* Johannot.

Defendant before the action commenced quitted the kingdom, leaving another in poſſeſſion of his houſe and goods; Plaintiff having ſerved a ſummons to appear at the houſe, diſtrained the goods to compel an appearance; and held regular.

The Defendant previous to the commencement of this action, which was on a bail-bond, quitted this country and reſided with his family in *Dublin*, having left his mother in poſſeſſion of the cottage and furniture which he formerly occupied. A ſummons to appear having been ſerved at the cottage, and no appearance entered, a *diſtringas* iſſued, under which forty ſhillings were levied on the effects in the mother's poſſeſſion.

Shepherd Serjt. on her part now moved for a rule *niſi* to ſtay the proceedings, and that the levy ſhould be reſtored with coſts: and cited *Webſter* v. *M'Namara*, *Trin.* 32 *Geo.* 3. *Imp. Pract. C. B.* 619. 4th ed.; where a ſimilar application by the wife of a perſon out of the kingdom was allowed.

The Court were of opinion, that as the Defendant had goods within the bailiwick by which he might be diſtrained, the proceeding was regular: but that at any rate the mother, who had no intereſt in the goods taken, could have no right to make this application. And *Eyre* Ch. J. added, that the caſe of *Webſter* v. *Macnamara*, if law, differed from this, as the application there was not made by the wife on her own account, but on the part of her huſband.

Shepherd took nothing by his motion.

Feb. 6th.

Driscol *v.* Passmore.

Inſurance on a voyage from *C.* to *D.* on a repreſentation that the ſhip was firſt to ſail from *A.* to *B.* and from *B.* to *C.*; the voyage from *A.* to *B.* was performed, but that from *B.* to *C.*, being unavoidably prevented, the ſhip returned to *A.*, from thence proceeded immediately to *C.* and in performing the voyage from *C.* to *D.* was loſt; and this was held a good commencement of the voyage inſured.

Assumpsit on a policy of inſurance, with a count for money had and received. The Defendant paid five guineas into court.

The ſhip *Timandra* being about to ſail on a voyage from *Liſbon* to *Madeira*, from *Madeira* to *Saffi* on the coaſt of *Africa* in ballaſt, and from thence back to *Liſbon*, with a cargo of wheat; the Plaintiff directed his broker to make three inſurances, *viz.* one on three-fourths of the ſhip for the round voyage, one on three-fourths of the freight on the voyage from *Liſbon* to *Madeira*, and one (which was the inſurance in queſtion) on three-fourths of the freight from *Saffi* to *Liſbon.*—The two former were effected without any difficulty, but the broker was not able to get the third underwritten at the ſame time, on account of the diſtant period at which the riſk was to commence: however, on a repreſentation ſome time afterwards, that he had received intelligence of the ſhip's arrival at *Madeira*, and that ſhe was about to proceed on her voyage immediately, this alſo was effected. When the *Timandra* arrived at *Madeira*, all the crew except two, being alarmed by reports of ſome *Mooriſh* cruiſers being off *Saffi*, and of their having captured and ill-treated a *Dane* and an *American*, quitted the ſhip, and refuſed to return to it unleſs the captain would promiſe to ſail immediately for *Liſbon.* Under theſe circumſtances, the captain carried the ſhip back to *Liſbon;* but on his arrival there, the charterers inſiſted on his proceeding directly from thence to *Saffi*; which he accordingly did, and was captured in his return from *Saffi* to *Liſbon.* It was in evidence that the difference of ſeaſon ariſing from this delay did not vary the riſk.

This was tried before *Eyre* Ch. J. at the Guildhall ſittings after *Trinity* Term, when a verdict was found for the Plaintiff.

A rule having been obtained in *Michaelmas* Term, calling on the Plaintiff to ſhew cauſe why the above verdict ſhould not be ſet aſide, and a new trial be had, on the ground of the voyage inſured never having commenced,

Shepherd Serjt. ſhewed cauſe. I contend, 1ſt, That the voyage in which the ſhip was captured, was the voyage inſured; ſince the previous voyage from *Liſbon* to *Madeira*, and from thence to *Saffi*, never having been abandoned, was virtually though not in fact performed. The *Timandra* ſailed from *Liſbon* to *Madeira* with a cargo, and from *Madeira* to *Saffi* by way of *Liſbon* in ballaſt. If ſhe had taken in a new cargo at *Liſbon*, and had ſailed on a different object from that originally in view, it might have been conſidered as an abandonment. Here there was not only a probable cauſe for the ſhip's return to *Liſbon*, but the captain was under the neceſſity of returning for the benefit of his owners. Deviation to avoid

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avoid perils is juſtifiable, and the new courſe therefore which was taken may be conſidered as a continuance of the original voyage, ſince it is not neceſſary to return to the point from which a deviation commenced (*a*). Doubts occurred at the trial whether the captain had not returned to *Liſbon* without probable cauſe, and therefore abandoned the voyage; and whether, as the voyage from *Liſbon* to *Saffi* was performed at the inſtance of the charterers, the captain's intention to abandon the original voyage was not thereby proved: but both thoſe queſtions have now been determined by the jury. 2dly, This was merely an inſurance on a voyage from *Saffi* to *Liſbon*, which has been literally performed: and it was not neceſſary to perform the preceding voyages from *Liſbon* to *Madeira*, and from thence to *Saffi*, in order to make that good. I do not contend that this was an indefinite inſurance on any voyage from *Saffi* to *Liſbon*, to be performed at any time: if the riſk had been materially altered, (as if the ſhip had firſt gone to the *Eaſt Indies*, and a *Spaniſh* war had broken out,) the underwriters would have been releaſed. It may be ſaid perhaps that they ſpeculated on the time when the riſk was to commence: but there was no warranty in this caſe: it was repreſented that the voyage in queſtion was to be performed after certain other voyages; and the repreſentation was true, for it was originally intended that the *Timandra* ſhould take that courſe, but by ſubſequent circumſtances ſhe was prevented from ſo doing. The policy therefore is not void for miſrepreſentation; nor was the riſk of the underwriters at all altered, as the deviation was juſtified by neceſſity.

Adair and *Le Blanc* Serjts. in ſupport of the rule. As to the laſt point made by the Plaintiff's counſel, we contend, that wherever a voyage is inſured from *A.* to *B.*, it muſt be underſtood either that the ſhip is at *A.* at the time of the inſurance, or it muſt be ſtated how and when ſhe is to arrive there: otherwiſe it will be an indefinite inſurance on the firſt voyage which the ſhip ſhall make, from *A.* to *B.* with the ſame maſter, and the other requiſites of the policy. Now if it be impoſſible to make an inſurance on a voyage from *A.* to *B.*, without ſtating whether the ſhip is at *A.* or when ſhe will be there, that circumſtance if ſtated becomes an ingredient of the riſk inſured; and this ſeems to have been the underſtanding of the underwriters in the preſent caſe, who refuſed to inſure till they were informed of the ſhip's arrival at *Madeira*. This was not an inſurance on any voyage which the ſhip might make from *Saffi* to *Liſbon*, but on a voyage from *Saffi* to *Liſbon*, being part of a

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(*a*) *Delaney* v. *Stoddart*, 1 T. R. 22.

voyage already commenced, from *Liſbon* to *Madeira*, from *Maderia* to *Saffi*, and from thence to *Liſbon*. Nor was it neceſſary for the underwriters to require a *warranty* that the *Timandra* ſhould go the whole voyage, having a *repreſentation* to that effect: and as the only difference between a warranty and a repreſentation is, that a mere formal deviation from the one is fatal, and only a ſubſtantial one from the other, this policy is clearly void, for the deviation here was ſubſtantial. With reſpect to the firſt point, the voyage inſured was abandoned; or rather as the latter part of the previous voyage was abandoned, the voyage inſured never commenced. At *Madeira* the captain was to exerciſe his judgment whether it was more for the benefit of his owners to relinquiſh the voyage altogether, or to wait at *Madeira* till he could find the means of proceeding. He did exerciſe his judgment, and by returning to *Liſbon*, evinced that he thought it better to abandon. The voyage undertaken at the inſtance of the charterer was a new voyage: no recommencement of what had once been abandoned could make the underwriter liable.

EYRE Ch. J. At the time of the trial, I had conſiderable doubts on this caſe: but the diſcuſſion of to-day, and the opportunity which I have had of further conſidering the queſtion, have in a great degree cleared them up. If I had continued to doubt I ſhould be unwilling to interfere with a verdict of a ſpecial jury of merchants on a ſubject of this kind, unleſs I clearly ſaw that ſome principle of law had been miſtaken; or unleſs I was bound by authorities to pronounce that verdict wrong. With reſpect to authorities there are none, for this is admitted to be a new caſe: we ought therefore to be fully ſatisfied, that upon ſome principle of law the verdict is wrong before we interfere by granting a new trial. It has been argued in ſupport of the rule, that the voyage inſured was the third branch of a ſpecific voyage, ſpecifically deſcribed in the policy: but I take the voyage inſured to be a voyage from *Saffi* to *Liſbon* only. Now that the voyage ſo deſcribed did literally commence there can be no doubt, and I know no way in which that voyage could be reſtricted in point of commencement or connexion with any other voyage, but by repreſentation or warranty. That point was ably put by my brother *Shepherd*: If a man be aſked to underwrite a voyage from *Saffi* to *Liſbon*, he naturally ſays, "Let me know what this voyage is, and at what time it is to commence, that I may judge of the riſk. Is the ſhip now at *Saffi*, or where is ſhe?" He will expect a

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repreſentation, and that repreſentation ought to be true: here the repreſentation was, that the ſhip was bound from *Liſbon* to *Madeira* with a cargo, from *Madeira* to *Saffi* in ballaſt, and from thence to *Liſbon*. That repreſentation was really true at the time that it was made, and the underwriter was to form his own calculation of the time when the *Timandra* would arrive at *Saffi*. If the inſurance was made on a repreſentation which was true at the time, it will be difficult to ſtate a caſe where ſubſequent events, not happening through miſconduct, and not totally diſappointing the voyage, will diſcharge the underwriter. He formed his judgment of the caſe, knowing that all was executory, and that an alteration might ariſe of a kind that might increaſe his riſk; upon the repreſentation made to him he underwrote. The fact is, that the repreſentation being true, a circumſtance occurred under which the captain was diſtreſſed how to act, and reſpecting which there might have been different opinions: he reſolved to go back to *Liſbon*; the charterer there called upon him to fulfil his engagements; he ſailed accordingly, and arrived at *Saffi*; and in the courſe of his voyage home was captured. Then why have the jury done wrong in ſaying that the underwriters are liable? They were literally bound to inſure a voyage from *Saffi* to *Liſbon*; tied up, indeed, as far as a repreſentation of the projected voyage, executory in its nature, could tie it up, and that repreſentation was true at the time that it was made. The voyage from *Saffi* to *Liſbon* might have been performed with as much eaſe after the circuitous voyage had taken place (unleſs a *Spaniſh* war had broken out) as in the direct courſe originally propoſed. On what principle then can the underwriters be diſcharged? The voyage has in ſubſtance been performed: the ſhip was diverted from her intended courſe by circumſtances for which no one was to blame, and having arrived at *Saffi*, took in the cargo which was the original object of the inſurance.

HEATH J. I am of the ſame opinion. This is an inſurance on a voyage from *Saffi* to *Liſbon*, which being a voyage to commence *in futuro*, it was neceſſary that the agent of the inſurer ſhould give all the intelligence of which he was poſſeſſed to the underwriters. Now the captain's orders were to go from *Madeira* to *Saffi*, and from thence to *Liſbon*. Indeed it is not contended that there was any miſrepreſentation, but only that the voyage inſured was never commenced; though the intention clearly was to have proceeded in the round voyage, had not the crew been alarmed by reports of an enemy off the coaſt of *Saffi*. The queſtion is not whether the captain meant to abandon, ſince he had it not in his power ſo to do, without the conſent of the charterers; and at their inſtance he *did* proceed on the voyage as ſoon as he conveniently could. This is like all other caſes of deviation juſtified by particular circumſtances, and I ſee no reaſon to quarrel with the verdict.

Rooke J. expreſſing ſome doubts with reſpect to the liability of the underwriters, founded on the circumſtance of their having at the time of the inſurance apparently taken into conſideration the period at which their riſk was to commence, ſince they refuſed to underwrite the *Timandra* till the broker informed them of her arrival at *Madiera*;

The caſe ſtood over till this day, when *Eyre* Ch. J. ſaid, that the Court were now unanimouſly of opinion, that no new trial ought to be granted.

Poſtea to the Plaintiff.

Purton *v.* Honnor.

Feb. 6th.

An action on the caſe to recover damages againſt the leſſor of the Plaintiff in a vexatious ejectment is not maintainable.

Action on the caſe to recover damages ſuſtained by the Plaintiff in defending a vexatious ejectment brought againſt him by the Defendant, in which the nominal Plaintiff had been *nonproſſed*.

General demurrer to the declaration: and joinder.

Cockell Serjt. was this day to have argued in ſupport of the declaration:

But the Court expreſſing themſelves clearly of opinion on the authority of *Saville* v. *Roberts*, 1 *Salk.* 14. that ſuch an action was not maintainable, he declined arguing the point; and the Court gave

Judgment for the Defendant.

Dahl *v.* Johnson.

Feb. 8th.

Where bail is taken under a judge's order in this court, each of the bail is liable to double the ſum ordered, as well as to double the ſum ſworn to in caſe of affidavit.

The Defendant being held to bail for 25 *l.* by a judge's order, in an action of aſſault, each of the bail entered into a recognizance for double that ſum: the Plaintiff obtained a verdict for

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105*l.* and ſigned judgment for his damages and coſts: accordingly a *ca. ſa.* iſſued againſt the Defendant for 138*l.* 5*s.* and the bail were fixed.

Cockell Serjt. now ſhewed cauſe againſt a rule *niſi*, for ſtaying all proceedings on their recognizance, upon payment by the bail of the ſum of 25*l.* and coſts; he contended, that whatever might be the practice of the King's Bench, as laid down in *Jackſon* v. *Haſſel*, *Doug.* 330. each of the bail was liable in the Common Pleas to the full extent of the recognizance, and cited *Calveraq et Ux.* v. *De Miranda*, 1 *Barnes* 74. *Mitchell and others* v. *Gibbons*, 1 *H. Bl.* 76. and *Fowlds* v. *Mackintoſh*, 1 *H. Bl.* 233.

Le Blanc Serjt. in ſupport of the Rule.—In *Calverac* v. *Miranda*, the bail only juſtified in the ſingle ſum ordered by the judge, and to that extent each was held liable; the inference from which caſe is, that the bail are not liable beyond the ſum ordered by the judge. The caſes of *Mitchell and others* v. *Gibbons*, and *Fowlds* v. *Mackintoſh* differ from this; the former having been a proceeding on the bail-bond, where the Defendant not appearing, the Plaintiff had no other remedy, and the latter an attachment againſt the ſheriff, whom the Court refuſed to relieve without his putting the Plaintiff in the ſame ſituation as he would have been in, but for the ſheriff's default. In *Calverac* v. *Miranda*, the bail only juſtified to the ſingle amount of the judge's order, and there is no rule of Court altering that practice. Indeed it would be a great hardſhip on the bail, who have formed their opinion of the ſum to which they may be liable from the judge's order, that they ſhould be held liable to a larger ſum.

EYRE Ch. J.—I think that this caſe cannot be argued on the nature of the contract which the bail may be ſuppoſed to have intended to enter into: ſuch an argument would be uſed in oppoſition to the whole practice which regulates caſes of bail. The bail always enter into a recognizance for double the ſum ſworn to, and no doubt they will be anſwerable to the extent of their recognizance for the damages ſuſtained by the Plaintiff. There is an end therefore of that kind of reaſoning which ſuppoſes that the parties were deceived in the contract into which they entered. I think the only queſtion is, whether there has been ſuch a miſtake in this inſtance as ſhould induce the Court to relieve the bail upon equitable terms? This muſt depend upon the notion, that when there is a judge's order the bail are only to be bound in that ſum which the order expreſſes. If there had been any ſettled practice of that kind I ſhould not have thought

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it unreaſonable: but on the principles which govern us with reſpect to bail in general, I can ſee no difference between an order, and an affidavit to hold to bail. The order is introduced becauſe from the nature of ſome particular caſes it is impoſſible for the Plaintiff to ſwear to the preciſe ſum due; inſtead therefore of aſcertaining the ſum by affidavit, it is left to the diſcretion of a judge to ſay what it ſhall be. But when once that ſum is aſcertained, on what principle is it that the bail ſhould not enter into the ſame kind of ſecurity as in common caſes? What is to be done on affidavits, is to be done on a judge's order; and I know no way of making our practice conſiſtent but by holding it ſo. It was formerly a rule of the Court that if the Defendant himſelf became bound, the bail ſhould only enter into a recognizance for the ſingle ſum (*a*). This was a general rule, and extended as well to caſes on affidavit, as to thoſe on a judge's order. Afterwards the court thought it improper for the Defendant to become bound at all, and made a rule (*b*) accordingly. With that I am well ſatisfied; if it was right for the Court to make a further regulation that the bail ſhould not be liable to more than the ſum ſworn to, they ſhould have ſaid ſo; but I cannot ſee that there is any diſtinction between this caſe, and the caſe of bail taken on affidavit.

Buller J. As the practice of this Court ſtands ſettled, the preſent caſe muſt be decided by it, for the reaſons which my Lord has fully and ably laid down. I cannot however but think the practice of the King's Bench more reaſonable. The bail there become bound in double the ſum, but they are not ſeparately liable to that extent; each may diſcharge himſelf on paying the ſingle ſum ſworn to. A man ſhould know the extent of his liability; if he conſent to become bound for 50 *l.* why go beyond that ſum? if you do, he never can know the extent of his own liability. I do not think our practice good; but that conſideration cannot affect this caſe: it may be matter for the deliberation of the Court, whether we ſhould not alter the practice, retaining it indeed in part, and making each of the bail liable to the ſum ſworn to, but not in the double ſum as is now the caſe. The bail look to ſee what the debt is, and it is reaſonable that they ſhould infer from thence the extent of their obligation. In the preſent caſe, however,

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(*a*) Vid. *Cooke's Rules and Orders, C. B.* 5 *W.* & *M.*

(*b*) *E. T.* 36 *G.* 3. It is ordered that from and after the firſt day of the next term in all actions requiring bail, the Defendant ſhall not be permitted to enter into the recognizance; but the bail ſhall each of them enter into a recognizance in double the ſum ſworn to.

they muſt be held liable to the amount of their recognizance ſeparately, not exceeding the ſum recovered.

Rooke J. The diſpute on this motion ariſes from the alteration introduced by the Court, forbidding Defendants to become bound at all. I certainly have acted under a miſtake: for when I have fixed the ſum for which the Defendant was to be held to bail at 10 or 20 pounds, I have conſidered the bail as giving ſecurity for no more. Formerly it was ſo, when the Defendant had his option to become bound with the bail: for if the Defendant was bound, the recognizance was only taken for the ſingle ſum. But does it follow from our having forbidden the Defendant to become bound, that when he has not his option, the bail ſhould be bound in double the ſum? That never was the caſe under the old practice, except when the Defendant did not chooſe to become bound.

The Court, with the conſent of the parties, made

The rule abſolute on payment of the amount of the recognizance by each of the bail with (*a*) coſts.

(*a*) This application having been firſt made to the Chief Juſtice, who referred the parties to the Court, and declarations having ſince that time been delivered, the Court reſtrained the coſts to be paid by the bail to the period of that application.

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Morris *v.* Wall.

If any part of the conſideration of an annuity be paid in *country bank* notes, the dates and times of payment muſt be ſet out in the memorial under the annuity act.

Shepherd Serjt. on a former day obtained a rule calling on the Plaintiff to ſhew cauſe why the judgment ſigned on a warrant of attorney given to ſecure an annuity of 75*l.* ſhould not be ſet aſide, on the ground of the memorial having ſtated that part of 600*l.* the conſideration-money, was paid "in notes on the Bank "of *England* and country bank notes," without ſpecifying the dates and times of payment of the latter. It now appeared however by the affidavit of the Plaintiff, that at the time of executing the deeds the Defendant had his option of being paid in caſh or notes, and accepted the latter as equally convenient to himſelf.

Clayton Serjt. for the Plaintiff. If it be only neceſſary to ſtate in the memorial that the conſideration was paid in money, the Court may conſider this as a payment in money. It is clear that by the word "money" the act (*a*) did not mean caſh only, for *ſ.* 4. ſuppoſes a caſe where payment is made in notes. The policy of the act was to prevent goods at an exaggerated price being made the conſideration of an annuity. But the queſtion here is, Whether any ſymbol of money paſſing current and accepted as money, be

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(*a*) 17 *Geo.* 3. *c.* 26.

not money within the meaning of the act? In *Wright* v. *Reed*, 3 *Term Rep.* 554. bank notes were ſo conſidered. A bank note tendered and not objected to is a good tender in money. So a country bank note payable on demand, if taken as payment, is good payment. To go one ſtep further, if a country bank note be accepted as a tender, but refuſed becauſe not ſo much in amount as the party thinks himſelf entitled to, it may be a good tender *pro tanto*. Much inconvenience would ariſe from ſetting out the dates and times of payment of notes in theſe tranſactions, ſince the number employed muſt often be ſuch as to occaſion great prolixity.

Shepherd contrà. No agreement between the parties to accept any thing as money can make any difference, ſince the object of the act is to prevent improvident agreements. The objection here does not ariſe from the dates and times of payment of the *bank* notes not being ſet out, but thoſe of the *country bank* notes, which are not always payable on demand. They are the promiſſory notes of a banker; and in *Rumball* v. *Murray* and another, 3 *Term Rep.* 298. and *Berry* v. *Bentley*, 6 *Term Rep.* 690. it was held that promiſſory notes and bankers checks muſt be ſet out. In this caſe, if 5 *l.* only was paid in bank notes, and the reſt in country bank notes payable at a month, 600*l.* will not in fact have been paid.

Eyre Ch. J. If this queſtion was open I ſhould feel no difficulty in deciding it. I ſhould be of opinion that the memorial need not be a memorial of the *tranſaction*, but of the *deeds*, and that the conſideration expreſſed in the latter, was to be the conſideration expreſſed in the former. If the conſideration, which may be in notes, is not *bonâ fide* paid, then I ſhould think the beſt and moſt conſiſtent method of effectuating the intention of the act, would be for the party to take his remedy by application to the Court, on affidavit, to have the deeds ſet aſide. But this queſtion has been decided, and ſo decided, that I am bound hand and foot. There are two caſes on the point, againſt which I cannot take upon myſelf to interpoſe my private judgment, ſitting here and exerciſing a ſummary juriſdiction. I wiſh indeed that the queſtion had been put upon the record, in the firſt inſtance, that a ſolemn deciſion might have been had, and a rule obtained, by which all the courts might be directed in the exerciſe of this ſummary juriſdiction. But when I ſee two determinations, that where the conſideration is paid in notes, not of the Bank of *England*, they muſt be ſet forth in order that the Court may ſee whether

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MORRIS *v.* WALL.

whether they are ſuch notes that they can be conſidered as caſh, I muſt ſubmit, though I do it with reluctance.

BULLER J. I am of the ſame opinion.

ROOKE J. I am of the ſame opinion.

Rule abſolute.

CALLIAND *v.* VAUGHAN.

Feb. 12th.

The Court will not by putting off a trial or other indirect means compel a party to conſent to a commiſſion for the examination of witneſſes in *Scotland*. Where contradictory verdicts have been found on a policy of inſurance and a third action brought againſt another underwriter, the Court will not put off the trial to enable him to obtain a commiſſion from a Court of Equity for the examination of witneſſes in *Scotland* to the ſame facts which were given in evidence on the laſt trial: at leaſt if he has obtained time to plead on the uſual terms.

A POLICY having been effected on the life of the late Earl of *Glencairn*, with a warranty of good health, ſeveral actions were brought thereon in the King's Bench, one of which was tried in *Eaſter* Term laſt, when a verdict was found for the Defendant. A ſecond action was afterwards brought in this court againſt another underwriter, and the evidence of the principal witneſs for the Defendant being impeached by new evidence on the part of the Plaintiff, he obtained a verdict. In both courts new trials were moved for and refuſed. The Plaintiff diſcontinued the remaining actions in the King's Bench, and brought them in this court, of which this was one.

Adair Serjt. on a former day applied to the Court, on the part of the Defendant, to exerciſe its authority by granting imparlances from time to time, or by ſuch other means as it ſhould think proper, to compel the Plaintiff to conſent, that a commiſſion ſhould iſſue out of this court for the examination of witneſſes in *Scotland*. He produced affidavits ſtating the importance of their evidence with reſpect to the ſtate of the Earl of *Glencairn*'s health, and contended that he was entitled to this indulgence as the evidence to be obtained was merely to ſupply the place of that which had been impeached upon the ſecond trial. He ſaid that the reaſon why he did not move to put off the trial in the uſual way was, that he could not ſtate any probability of the witneſſes being able to attend at any future time.

The Court however not being ſatisfied that it was proper for them to compel a party, by indirect means, to do what they had no authority to compel him to do directly, and adverting to an important queſtion which might ariſe, Whether any one giving his teſtimony under ſuch a commiſſion could be convicted of perjury? intimated that it would be better for the Defendant (if all the underwriters were willing to be bound by a third verdict)

verdict) to apply to the Court to put off the trial for the abſence of material witneſſes, till the Defendant could obtain a commiſſion from a Court of Equity; at the ſame time ſaying, that if the Plaintiff ſhould oppoſe the rule on the ground ſuggeſted by *Adair*, it muſt be diſcharged. Accordingly a rule *niſi* was taken in this way.

Cockell and *Heywood* Serjts. now ſhewed for cauſe an affidavit, ſtating, Firſt, that the Defendants had already obtained an order for ſix days time to plead on an undertaking to plead iſſuably, and take ſhort notice of trial; the Defendant therefore was bound by the terms of his own rule, and could not in violation of it apply to put off the trial: Secondly, That previous to the action's being diſcontinued in the King's Bench the underwriters had hurried the Plaintiff on by threatning a *non pros.* They contended that there was no fact to be brought forward by the additional witneſſes which the Defendant was not as much aware of at the laſt trial as at the preſent time; and ſaid that the Court of King's Bench had conſtantly refuſed commiſſions to examine witneſſes where great contradiction of evidence had been expected, as in caſes reſpecting the ſea-worthineſs of a ſhip.

Adair and *Shepherd* Serjts. in ſupport of the rule ſaid, that the underwriters had hurried on the Plaintiff in the King's Bench for no other purpoſe than to compel him to make his election of diſcontinuing, or proceeding to trial: and that the Plaintiff's caſe would be ultimately expedited by this temporary delay, as all the underwriters would be bound by a third verdict if the additional evidence were procured.

EYRE Ch. J. The propoſal made on the part of the underwriters to be bound by a third verdict was worth the Plaintiff's conſideration. He probably has good reaſons for refuſing to accede to it. The propoſal is at leaſt ſtrong proof that this motion was not made merely for delay, and that the Defendant had ſome hopes of obtaining evidence which might turn the verdict in his favour. The Plaintiff however thinks fit to ſtand upon his rights: he refuſes to conſent, and we are called upon for a deciſion. The queſtion then is, whether the Court ſhould, under the circumſtances of this caſe, give the Defendant till next term to enable him to apply to a Court of Equity. The reaſons ought to be very many, and very ſtrong, to induce us to grant this favour. On the motion for a new trial here, it was propoſed to the underwriters to conſent to be bound by a third verdict, as the two former were contradictory, but this was not acceded to. I lay no other ſtreſs on that circumſtance, than as it proves that the underwriters choſe to proceed in the moſt adverſe way. From that moment, therefore, they ſhould have ſet about procuring the neceſſary evidence for their defence. They underſtood their cauſe at that time as well as they do now; and yet they did not apply to a Court of Equity for a commiſſion, as a large body of underwriters uſually does. They firſt hurry on the Plaintiff in the King's Bench, and then obtain time to plead on the uſual terms. After all that has paſſed it is impoſſible for the Court deciding adverſely to put off the trial of this cauſe in order to give the Defendant the opportunity of applying to a Court of Equity, which he has loſt by his own neglect.

BULLER J. Whether theſe underwriters ought to be ſatisfied with the laſt verdict, or whether they act wiſely in perſiſting, are queſtions which the Court has nothing to do with. The Defendant does not now come in the ordinary courſe of juſtice, but is aſking what he is not entitled to of right, and what, if granted, will be to the prejudice of the Plaintiff. I obſerve that the Defendant does not pretend to produce evidence of any new fact, of which the underwriters were not apprized at the time of the firſt trial; it ſeems that he has only got four or five witneſſes more to prove the ſame thing. But that ought not to have any weight. I have always told a jury that if a fact is fully proved by two witneſſes it is as good as if proved by a hundred. I do not know that the Court of *Chancery* would grant a commiſſion of this kind of courſe: I think not. Taking into conſideration the circumſtance of the Defendant having bound himſelf by the terms of the order not to delay the Plaintiff, I am of opinion that this rule ſhould be diſcharged with coſts.

ROOKE J. The Plaintiff having refuſed to conſent to put off the trial, the caſe muſt ſtand on its own merits, and as the Defendant has entered into terms, he ought not now to be allowed to delay the Plaintiff. But I think it would be going too far to diſcharge the rule with coſts.

EYRE Ch. J. ſaid that as the Defendant had not diſcloſed by his affidavit that he was under terms, he concurred in the opinion that the rule ſhould be diſcharged with coſts.

Rule diſcharged with coſts.

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Feb. 12th.

Leominster Canal Company *v.* Cowell and Another.

A rent charged on the rates by a canal act as a compenſation for damage done to land, is not within the 11 *Geo.* 2. *c.* 19. *ſ.* 22. ſo as to entitle an avowant to double coſts; nor is any rent-charge.

Replevin of a boat taken belonging to the Company. Avowries, 1ſt, That by the 31 *Geo.* 3. *c.* 69. the Company was authorized to enter into the lands of any perſon, and ſet out ſuch parts as they ſhould think neceſſary for the canal; making a recompence for all damage done by a ſum in groſs or by an annual rent to be charged upon the rates; that a power was given to diſtrain the boats of the Company upon the canal in caſe *ſuch rent* ſhould be in arrear twenty-one days; that the Company entered into and damaged the avowant's lands; that the recompence was adjuſted by an annual rent, and becauſe that was above twenty-one days in arrear he diſtrained, *&c.* 2d, That after the paſſing of 31 *Geo.* 3. *c.* 69. a ſum was due from the Company to the avowant for rent on account of land ſet out and damaged, and afterwards adjuſted according to the proviſions of the ſaid act. Theſe facts having been traverſed and found for the avowant and judgment entered accordingly, *Williams* Serjt. on a former day obtained a rule to ſhew cauſe why the prothonotary ſhould not be directed to review his taxation, he having allowed double coſts.

Clayton Serjt. now ſhewed cauſe. The Canal Act gives a diſtreſs for rent, and ſays, if it is not redeemed it may be appraiſed and ſold "in ſuch manner as the law directs in caſes of diſtreſs for rent." If this clauſe be coupled with 11 *Geo.* 2. *c.* 19. *ſ.* 22. it will entitle the avowant to double coſts. This is a caſe between landlord and tenant; the rent *eo nomine* is to be paid to the owner of the land while the damage continues, and unleſs it is purchaſed there is a reverſion of the land itſelf to him as ſoon as it ſhall ceaſe. The benefit of 11 *Geo.* 2. is not confined to caſes where the avowry pointed out by that act is uſed; a party is ſtill at liberty to avow at length, though if he does, he muſt prove his title *in omnibus*. At any rate however the ſecond avowry is general. The caſe of *Loyd* Eſquire v. *Winton*, 2 *Wilſ*. 28. where double coſts were not allowed, was a caſe of ſeizure for a heriot cuſtom and not a diſtreſs for rent, and is therefore very diſtinguiſhable from the preſent.

Williams Serjt. *contrà*. The firſt avowry is admitted to be under this canal act, but it is contended that the ſecond is general. That however would be bad on demurrer unleſs ſupported by this act,

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LEOMINSTER Canal Company *v.* COWELL.

for in a caſe between landlord and tenant the diſtreſs muſt be taken upon the premiſes; whereas here the boat was not taken on the avowant's premiſes, but on the canal. The 11 *Geo.* 2. was made to remedy the difficulty landlords had in ſetting out their title on the record, and only gives double coſts in caſes of avowries under that act. This is ſtrongly ſhewn by the caſe in 2 *Wilſ.* where the Court refuſed to extend that act to an avowry for a heriot cuſtom. The words "appraiſed and ſold in ſuch manner "as the law directs in caſes of diſtreſs for rent," does not apply to 11 *Geo.* 2. but to 2 *W.* & *M.* *ſeſſ.* 1. *c.* 5. which firſt enabled the party to ſell what was a mere pledge at common law.

EYRE Ch. J. (ſtopping *Williams.*) We need only look at the *Leominſter* Canal Act to be ſatisfied that this is not a diſtreſs for rent within the meaning of 11 *Geo.* 2. the diſtreſs intended to be protected by that act, is a diſtreſs for a certain rent directly reſerved by a landlord on his grant or demiſe of land theretofore made. In that caſe the landlord may avow generally, and is entitled to double coſts. But this is a diſtreſs for rent by the Canal Act charged on the rates; it is a mere rent-charge, with a power of diſtreſs given; and not at all like the caſe of rent reſerved by tenure. A rent-charge is not within the 11 *Geo.* 2.

Per Curiam, Rule abſolute (*a*).

(*a*) Vide alſo *Leominſter Canal Company* v. *Norris* and another, 7 *Term Rep.* 500. where the ſame point was contended and the ſame judgment given by the Court of King's Bench. A motion had alſo been made in this caſe ſimilar to that in the King's Bench, on the ground of the inſufficiency of the avowries; but was abandoned after the deciſion of that Court.

Feb. 12th.

HOLSTEN *v.* CULLIFORD.

It is not ſufficient to ſtick up a notice of declaration in the office if the defendant's laſt place of abode is known; for it ought to be ſerved there.

CLAYTON Serjt. ſhewed cauſe againſt a rule *niſi* for ſetting aſide the interlocutory judgment in this caſe, and produced an affidavit of the clerk to the Plaintiff's attorney, ſtating, that he had ſtuck up the notice of declaration in the office, "not knowing "where the defendant was to be found."

The Court (after conferring with the officer) ſaid, that if the Defendant was not to be found after due ſearch the notice of declaration ought to be ſerved at his laſt place of abode, or at leaſt it ſhould be ſworn on the part of the Plaintiff that the Defendant's laſt place of abode was not known.

Shepherd Serjt. for the Defendant.

Rule abſolute.

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BURNSALL *v.* DAVY and others.

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A. deviſed all his freehold and leaſehold eſtates to *B.* and the iſſue of her body "as tenants in common, but in default of ſuch iſſue, or being ſuch, if they ſhould all die under twenty-one and without leaving iſſue" then over: held that all the limitations ſubſequent to that to *B.* being contingent, the remainders in the freehold were barred by fine and recovery, but that the leaſehold veſted in the remainderman on the death of *B.* without iſſue.

THIS was a caſe from the Court of Chancery, the ſubſtance of which was as follows;—

David Burnſall deceaſed, being ſeiſed in fee of and lawfully entitled unto certain freehold and leaſehold eſtates, by his will dated the 26th *November* 1791, duly executed and atteſted ſo as to paſs his real eſtates, gave and deviſed as follows, that is to ſay, "I do hereby give deviſe and bequeath all and every my freehold "and leaſehold eſtates and all other my eſtates whatſoever both "real and perſonal (ſubject and chargeable as therein mentioned) "after payment and diſcharge of all my debts legacies and my "funeral and teſtamentary charges and expences and the expences "in and about executing this my will *unto my niece* Mary "Owſtwick *otherwiſe* Ellard *and the iſſue of her body lawfully* "*to be begotten as tenants in common (if more than one), but in* "*default of ſuch iſſue or being ſuch if they ſhall all die under the age* "*of twenty-one years and without leaving lawful iſſue of any of* "*their bodies, then I deviſe the ſame unto my couſin* Peter Davy "*and the iſſue of his body lawfully to be begotten as tenants in com*"*mon (if more than one) but in default of ſuch iſſue or being ſuch* "*if they ſhall all die under the age of twenty-one years and with*"*out lawful iſſue of any of their bodies* or in caſe neither he nor "any ſuch his lawful iſſue (if any) ſhall take upon himſelf or "themſelves the ſurname of *Burnſall* in virtue of an act of par"liament or other legal method to be made or taken for that pur"poſe within the ſpace of two years after coming into the poſſeſſion "of the ſame eſtates and property by virtue of this my will, that "then and in either of ſuch caſes happening the ſame eſtates "and property ſhall actually go, and I for that purpoſe hereby "give deviſe and bequeath the ſame to *Stephen Ganton* his heirs "executors or adminiſtrators for ever, but recommend and hope "that he they or ſome or one of them will take upon himſelf "herſelf or themſelves my ſaid ſurname of *Burnſall.*"

Power was given by the will to *Mary Owſtwick* otherwiſe *Ellard* at any time or times during her life, and to *Peter Davy* at any time or times during his life, when and as they ſhould reſpectively come into and be in the actual poſſeſſion of the ſaid eſtates and property to grant the freeholds upon building leaſes for ſeventy years, and to grant either the freeholds or leaſeholds upon other leaſes for twenty-one years.

David Burnſall afterwards died without altering his ſaid will, leaving the ſaid *Mary Owſtwick* otherwiſe *Ellard* (who was then the wife of the Plaintiff) his niece and heireſs at law, and the ſaid *Peter Davy* and *Stephen Ganton* him ſurviving.

Mary Owſtwick the niece is ſince dead, without ever having had any iſſue, but ſhe and her huſband before her death, and within two years after the death of the teſtator, took upon themſelves the ſurname of *Burnſall*, in purſuance of the ſaid teſtator's will, and by the authority of his majeſty's letters patent, granted to them for that purpoſe; and ſoon after the teſtator's death entered upon the freehold eſtate and ſuffered recoveries, and levied fines thereof to the uſe of ſuch perſons and for ſuch eſtates as the ſaid *Joſeph Ellard* and *Mary* his wife ſhould appoint. And for default of appointment to the uſe of *Joſeph Ellard*, for the joint lives of himſelf and his wife, and after the deceaſe of either to ſurvive for his or her life, with remainder to the heirs and aſſigns of *Joſeph Ellard* in fee.

The queſtions for the opinion of the Court were, 1ſt, What eſtate and intereſt the ſaid *Mary Owſtwick*, otherwiſe *Ellard*, took under the teſtator's will, and the recoveries and fines in the teſtator's freehold eſtates? 2dly, What eſtates the ſaid *Mary Owſtwick*, otherwiſe *Ellard*, took under the teſtator's will, in the ſaid teſtator's leaſehold eſtates? 3dly, What eſtate the Defendant *Peter Davy* took under the ſaid will in the teſtator's freehold eſtates? 4thly, What eſtate the Defendant *Peter Davy* took under the ſaid will in the teſtator's leaſehold eſtates?

This caſe was argued in *Eaſter* Term laſt by *Palmer* Serjt. for the Plaintiff, and *Williams* Serjt. for the Defendant.

Palmer Serjt. *Mary Owſtwick* took an eſtate tail in the freehold, and an abſolute eſtate in the leaſehold property. It is manifeſt that both kinds of property were intended by the deviſor to go together to the ſame deſcription of perſons; it is therefore only neceſſary to eſtabliſh, that an eſtate tail in the freehold paſſed, and an abſolute eſtate in the leaſehold will follow of courſe. The intereſt of *P. Davy* in the freehold being contingent, is at all events barred by the recovery, whether *M. Owſtwick* took an eſtate for life or in tail. If ſhe took an eſtate tail the contingency is manifeſt. But ſuppoſe it to be an eſtate to *M. Owſtwick* for life, remainder to her children for life, ſtill the intereſt of *P. Davy* would not be abſolute on the determination of thoſe eſtates; for if one of the children had arrived at the age of twenty-one or had left iſſue, *P. Davy* could not have taken any thing. If we were merely contending for the freehold, we need only cite the deciſion between theſe parties, 6 *Term Rep.* 34.; it is for the purpoſe of the leaſehold only, that it becomes neceſſary to diſcuſs what eſtate *M. Owſtwick* took. The prefatory words "all my freehold and leaſehold eſtates" are not ſufficient to give an eſtate in fee to the children; for though great ſtreſs has been laid upon ſuch words, where a queſtion has ariſen between the deviſee and the heir at law in caſes where all has been deviſed by ſuch prefatory words, and ſomething remained undiſpoſed of by the particular clauſes of the will, yet in this caſe every thing has been deviſed away, and the only queſtion is, Whether *A.* or *B.* ſhall have a particular part of it. The only caſes where the word "iſſue" can be conſtrued to be a word of purchaſe, are, 1ſt, where an expreſs eſtate for life is given to the anceſtor, remainder to his iſſue and the heirs of ſuch iſſue; in which caſe the term "iſſue" denotes ſome individual, becauſe the ſubſequent words of limitation are inconſiſtent with the anceſtor's taking the whole eſtate. 2dly, Where a perſonal eſtate is given to the anceſtor for life and to his iſſue without any diſpoſition over: but there is no inſtance of ſuch a conſtruction being put upon the word "iſſue" in caſes of freehold eſtates without ſubſequent words of limitation. The Courts have conſtrued ſuch words as appear to give an eſtate for life only, as giving an eſtate of inheritance, where the property would otherwiſe go to a different family from that which was intended to take, *Roe* v. *Grew and others*, 2 *Wilſ.* 322. *Robinſon* v. *Robinſon*, 1 *Burr.* 38. and in *Doe* v. *Applin*, 4 *Term Rep.* 82, where the deviſe was to *W. D.* of a freehold eſtate for life, and after his deceaſe *to and amongſt his iſſue*, and in default of iſſue then over, the Court went ſo far as to reject the words "and amongſt" in order to effectuate the general intention, and held that *W. D.* took an eſtate tail. On the ſame ground the Court in this caſe may, if neceſſary, reject the words "tenants in common." In *Doe* v. *Applin*, Lord *Kenyon* thought that the general intention would fail for want of limitation to the iſſue. Here if the word "iſſue" be underſtood fully, that is including all deſcendants, it muſt be conſidered as a word of limitation: if it be conſidered as deſignating one or more perſons only it muſt be confined to iſſue born in the life of the deviſor, *Cook* v. *Cook*, 2 *Vern.* 546. But the ſame word cannot be conſtrued to mean two things in the ſame breath: if the iſſue of *M. O.* would take by purchaſe, the words "lawful iſſue of their bodies" muſt be confined to iſſue to be born within a limited time, to the excluſion of their general deſcendants. But to ſay that it is an eſtate for life to *M. O.* and then over, would be directly contrary to all the caſes where the general intention of the teſtator has been adopted, notwithſtanding particular words which ſeem to contradict it.

Williams Serjt. contrà. I ſhall contend that *M. Owſtwick* took an eſtate for life with contingent remainders to her children in tail, and that the remainder over to *Peter Davy* was a veſted remainder. This is with a view to the freehold, and if I can eſtabliſh a right to that the leaſehold will follow of courſe. The general intention of the teſtator may be effected, without giving an eſtate tail to *M. O.*, for if ſhe take an eſtate for life with croſs remainders to her iſſue in tail, the remainder to *Peter Davy* will not take effect till all her iſſue is extinct. The words of the will are "as tenants in common if more than one." Now croſs remainders may be intended here, for, if on the face of the will they appear neceſſary to the intention of the teſtator, the Court will imply them. In *Doe* v. *Wainewright*, 5 *Term Rep.* 427., Lord *Kenyon* ſaid, "No technical preciſe form of words is neceſſary to create croſs remainders." Here the intention is manifeſt from the words "if they ſhall all die under the age of 21 years, and without leaving lawful iſſue of their bodies." The ground of the deciſion in *Doe* v. *Applin* was, that no croſs remainders could be implied: and there Mr. J. *Buller* ſaid, that in rejecting the words "and amongſt," the Court would be going farther than they had gone in any former caſe. In the next place the iſſue of *M. O.* would have taken an eſtate tail, in which caſe *Peter Davy* took a veſted remainder. In *Luddington* v. *Kime*, 1 *Ld. Raym.* 203. 1 *Salk.* 224. 3 *Lev.* 431. it was held, that where the meſne eſtates are particular eſtates, the remainder limited over may veſt. In this caſe the teſtator gives an eſtate "to the iſſue of the body of *M. O.* as tenants in common, if more than one;" now it is clear that if the will had ſtopped there, the children could have taken only an eſtate for life, and the remainder to *Peter Davy* would be veſted: and the ſubſequent words only ſubject that remainder to be deveſted by iſſue. But admitting the ſubſequent words to be words of inheritance, it is impoſſible that they ſhould give a fee: for even ſuppoſing that the deviſe had been to the iſſue of *M. O.* and their heirs, the ſubſequent words "without lawful iſſue of their bodies" would

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reſtrain the general expreſſion of heirs, to heirs in tail. 19 *H.* 6. 74. *b.* cit. *Dougl.* 266. in *notis*, and if that be the caſe, where a fee is expreſsly given, *a fortiori*, it will be ſo where the eſtate given is not ſo large. The caſe of *Doe* v. *Laming*, 2 *Burr.* 1100., is much ſtronger than this, for "heirs" is a more technical expreſſion than "iſſue," and yet the Court there in order to effectuate the general intention of the teſtator reſtrained the eſtate of the firſt taker to an eſtate for life. So in *Doe* v. *Reaſon*, cit. *Doe* v. *Holmes*, 3 *Wilſ.* 245. *Ryder* Ch. J. ſaid, that "after the death of the tenant for life, the iſſue (which in a will is a word that operates as effectually to make an eſtate tail as the words heirs of the body do in a deed) are to take as purchaſers, for the deviſe is to the iſſue of the body of the niece, and to the heirs of ſuch iſſue." The words uſed by the deviſor in this caſe "without leaving lawful iſſue" are ſufficient to give an eſtate tail; nor does the addition of the words "if they ſhall all die under the age of twenty-one years" make any difference, for the remainder could not take effect till failure of iſſue. *Soalle* v. *Gerrard*, *Cro. Eliz.* 525. *Moor* 422. *Brownſword* v. *Edwards*, 2 *Vez.* 248. If the children were to take an eſtate in fee, why ſhould the teſtator have limited over to *Peter Davy*, and have required him to obtain an act of parliament in order to take the name of *Burnſall*, ſince if they were once poſſeſſed of a fee they might diſpoſe of it to a ſtranger to that name? Such a conſtruction would defeat his apparent intention of giving the eſtate over to a collateral relation who ſhould take his name, on failure of iſſue of the children of *M. O.* At all events whether the children of *M. O.* would have taken an eſtate in fee or in tail, *Peter Davy* is equally entitled to the leaſehold. In *Doe* v. *Lyde*, 1 *Term Rep.* 596. it was laid down as a general principle, that "where there is an expreſs limitation of a chattel, by words, which if applied to a freehold would create an *expreſs eſtate tail*, the whole intereſt veſts abſolutely in the firſt taker, and a limitation over of ſuch a chattel is too remote to take effect. But where there is no ſuch *expreſs* legal limitation the Court will conſider the intention of the teſtator." The recovery in this caſe certainly could not affect the leaſeholds, for they did not paſs to make a tenant to the *præcipe*.

Palmer in reply. No doubt a remainder limited to a perſon in being, after preceding limitations to perſons not in being, may open and let in thoſe perſons when they come *in eſſe*; but the idea of veſting and afterwards deveſting would deſtroy the diſtinction between veſted and contingent remainders. As long as it is uncertain whether the party will ever take any thing, the remainder is contingent, but a veſted remainder takes effect immediately, in intereſt, and will take effect in poſſeſſion by lapſe of time; it may open, but continues veſted becauſe certain. The remainder to *Peter Davy* was therefore contingent, ſince if any of the children had arrived at the age of twenty-one he could have taken nothing. The caſe of *Doe* v. *Wainewright* proves nothing, for croſs remainders were there created, though not in technical language. Indeed the diſtinction with reſpect to croſs remainders is this, between two the preſumption is in favour of them, between more than two, againſt (*a*) them. If the Court can imply croſs remainders in this caſe, they might have been implied in *Doe* v. *Applin*. It is not diſputed that if the eſtate had been limited to the iſſue of *M. O.* and their *heirs*, the word "heirs" might be qualified to mean heirs in tail; but here no ſuch qualification can take place, as no ſuch words of limitation are added. There is no caſe where the Court has enlarged the eſtate of the ſecond taker for the purpoſe of effectuating the general intention of the teſtator; if in *Robinſon* v. *Robinſon* they could have done ſo, they might have effectuated the intention of the teſtator more completely.

EYRE Ch. J. Technical rules are not to be relied upon in explaining the intention of teſtators: and yet caſes of intention are much embarraſſed by authorities. If this caſe were ſtripped of all authorities I would inquire what was the intention of the teſtator, as it appeared from the circumſtances of his family, and the words of the will: and next I would examine the rules of law, to ſee how far the intention of the teſtator was conſiſtent with them. An anxiety to effectuate what has been conſidered as the leading intention of teſtators has introduced all the difficulty in this kind of caſes. It often happens that a teſtator means to limit his eſtate in a way which the law does not allow. The only words in this caſe which raiſe any difficulty in my mind are theſe, "if they ſhall all die under the age of twenty-one years;" if they were omitted it would be a ſimple caſe. There were two branches of the teſtator's family on whom, being the principal objects of his bounty, he intended to ſettle his property in ſucceſſion, and on failure of whom he intended that it ſhould go over to *Peter Davy*. He deviſes firſt, to *Mary Owſtwick*, and ſecondly to the iſſue of her body: if the firſt taker died without iſſue he meant that the

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(*a*) *Pery* and Others v. *White*, in Error, *Cowp.* 780.

eſtate ſhould go to another perſon; again, if the firſt taker left iſſue, and they all died without iſſue, the objects of the teſtator's bounty in his own family being gone, the property was to go over. This being clearly the intention, how is it to take effect? If it were not for the words "if they ſhall all die under the age of twenty-one years," I ſhould be of opinion that this muſt be conſtrued to be an eſtate for life to *M. O.* remainder in tail to her iſſue as purchaſers, with croſs remainders to every one of that family, and then over to the next branch. But I am at a loſs to know what to do with thoſe words. If I were perfectly ſatisfied with the rejection of the word "amongſt" in *Doe* v. *Applin* I would reject them, and conſider this as a deviſe over in caſe the iſſue of *M. O.* ſhould die without leaving lawful iſſue of any of their bodies.

Buller J. I incline to think that it will be impoſſible to reject the words "if they ſhall all die under the age of twenty-one years." There is a circumſtance attending this will which might give reaſon to ſuppoſe that the teſtator had ſomething of a legal underſtanding. Suppoſe that he knew for how long a time he could tie up his property? By the words of the will the eſtate is given to *Mary Owſtwick*, and the heirs of her body as *tenants in common* if more than one; now "tenants in common" can only apply to the iſſue, for ſhe and one of the iſſue could never take as tenants in common; the power of leaſing given to *M. O.* while in poſſeſſion confirms me in my opinion that ſhe was to take an eſtate for life only, and that the whole eſtate was to go to her iſſue after her death. Poſſibly the teſtator reaſoned thus: "I will give an eſtate for life to *M. O.* with an eſtate tail to her children till they arrive at twenty-one, and then a fee, at which time the law will give them a fee by means of a common recovery." If this conſtruction be right the remainder to *Peter Davy* is contingent; for it does not ſolely depend on the determination of the preceding eſtate. If a child of *M. O.* had attained the age of twenty-one, and afterwards died without iſſue, the eſtate would have gone to *Peter Davy*, for the contingency muſt happen before the eſtate can veſt at all. With reſpect to the leaſehold property it is perfectly clear, that it cannot be touched by fine or recovery.

The Court took till this term to conſider of their opinion, when the following certificate was ſent to the Lord Chancellor:

We are of opinion, 1*ſt*, That under the will of this teſtator *Mary Owſtwick*, otherwiſe *Ellard*, took an eſtate for life in the teſtator's freehold eſtates with contingent remainders to the other perſons mentioned in the ſaid will, which contingent remainders were barred

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by the fines and recoveries levied and ſuffered by *Mary Owſtwick*, by force whereof *Mary Owſtwick* became ſeiſed of an eſtate in fee in the ſaid eſtates.

2dly, That *Mary Owſtwick* took an eſtate for life in the ſaid teſtator's leaſehold eſtates.

3dly, That under the ſaid will *Peter Davy* took an eſtate for life in remainder in the ſaid freehold eſtates on the contingency therein expreſſed, which eſtate with all the ſubſequent limitations were afterwards barred by the fines and recoveries ſuffered by *Mary Owſtwick*.

4thly, That under the ſaid will *Peter Davy* became abſolutely entitled to the teſtator's leaſehold eſtates on the death of *Mary Owſtwick* without iſſue.

12th *Feb.*

Jas. Eyre.
F. Buller.
J. Heath.
G. Rooke.

Feb. 12th.

Shaw *v.* Everett.

To aſſumpſit on a bill of exchange the Court will not allow a Defendant to plead the general iſſue, and that the bill was given on a ſtock-jobbing tranſaction contrary to 7 *Geo.* 2. *c.* 8.

Le *Blanc* Serjt. ſhewed cauſe againſt a rule *niſi* for pleading ſeveral matters to aſſumpſit on a bill of exchange, *viz.* 1ſt, The general iſſue. 2dly, That the bill was given on a ſtock-jobbing tranſaction contrary to 7 *Geo.* 2. *c.* 8. He contended that any thing which went to impeach the conſideration of the note might be given under the general iſſue, and that the only object of this application on the part of the Defendant was to get over the time in which a notice of trial might be given for the next ſittings, by introducing a long replication.

And the Court being of this opinion,

Diſcharged the Rule (*a*).

Adair Serjt. for the Defendant.

(*a*) In this term in a caſe of *Angerſtein* v. *Vaughan* a ſimilar rule for pleading, 1ſt, the general iſſue, and 2dly, alien enemy, to a declaration on a policy of inſurance was diſcharged by the Court; *Shepherd* Serjt. for the Plaintiff: *Heywood* Serjt. for the Defendant.

Mr. J. Heath was abſent from the 29th of *January* to the end of the Term from indiſpoſition.

THE END OF HILARY TERM.

C A S E S

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Eaſter Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

M'COLLAM *v.* CARR.

April 26th.

The juriſdiction of the Court of Conſcience does not extend to contracts made on the high ſeas; nor will the Court allow a ſuggeſtion for double coſts under 23 *G.* 2. *c.* 33. where the original debt being above 40*s.* has by a balance of accounts been reduced below that ſum.

ASSUMPSIT for ſeaman's wages. The declaration contained two counts, one on a ſpecial contract, and another for work and labour generally. At the trial the Plaintiff attempted to prove that he had been preſſed out of the ſhip with the colluſion of the Defendant, but failed to eſtabliſh that fact. The Defendant had paid him a certain ſum as wages up to the period of his quitting the ſhip, but having made a ſmall miſtake in calculating the time, the Plaintiff obtained a verdict for 1 *l.* 2 *s.* on the laſt count.

Shepherd Serjt. now moved for leave to enter a ſuggeſtion on the Roll, under 23 *Geo.* 2. *c.* 33. that the Defendant was reſident in *Middleſex*, and liable to be ſummoned to the County Court. He contended, that as the principal part of the debt had been actually paid, and was not merely to be done away by a ſet-off, the Plaintiff had no demand on the Defendant beyond the ſum of 1 *l.* 2 *s.* at the time when he commenced his action.

Eyre Ch. J. Does the Court of Conſcience try contracts made on the high ſeas, by conſidering them as if made in the pariſh of *Saint Mary le Bow* in the Ward of *Cheap*? Theſe actions though tranſitory as to the ſuperior Courts are not ſo as to the Court of Conſcience: clearly therefore, the cauſe of action in this caſe did not ariſe within the juriſdiction of that Court. Beſides the action ariſes on a contract, part of which has been ſatisfied by money on account. Is there any caſe where the ultimate balance of an account only being under 40*s.* the Court has allowed a ſuggeſtion? I ſhould pauſe upon ſuch a caſe ſince the moſt intricate point in accounts between merchant and merchant might by this means come to be decided before a County Court. It ſeems to me that the original demand ought to be under 40*s.*

Shepherd took nothing by his motion (*a*)

(*a*) An application of the ſame nature having been made under ſimilar circumſtances in *Bell* v. *Martin*, in *Trinity* Term following, both theſe points again aroſe, when the Court adhering to the above determination refuſed a rule to ſhew cauſe.

April 26th.

VAUX *v.* ANSELL.

An annuity memorial ſtating that the conſideration money was paid to *A. B.* and *C.* "ſome or one of them" is bad: though it appear that the money was paid on the day on which the deed was executed by them all.

A Rule *niſi* for ſetting aſide an annuity having been obtained on a former day on the ground of the following defect in the memorial, *viz.* that the conſideration money was ſtated to have been paid to *A. B.* and *C.* "ſome or one of them;"

Adair Serjt. now ſhewed cauſe, and contended, that as it appeared by the indorſement on the deed that the money was paid on the ſame day on which the deed was executed by all three parties, it might be preſumed that they were all preſent at the time of payment, and therefore payment to any one of them was a payment to all.

The Court however obſerved, that as the payment appeared to have been made on the ſame *day* only, and not at the ſame *time* when the deed was executed by all the parties, it could not be preſumed that they were all preſent at the time of payment.

Adair then offered to produce an affidavit of that fact;

But the Court were clearly of opinion that a defect of this kind in an annuity memorial could not be remedied by a ſubſequent affidavit.

Rule abſolute.

Shepherd Serjt. in ſupport of the rule.

BURBIGE *v.* JAKES.

April 27th.

Evidence of a houſe ſituate in the pariſh of *M.* will ſupport an averment of a houſe "at *S.*" *S.* being extraparochial and both places uſually going by the name of *S.*

THIS was an action on the caſe for raiſing the footpath on each ſide of the Plaintiff's houſe, by which the water was collected immediately in front of it. The declaration ſtated that the Plaintiff was poſſeſſed of a meſſuage "at *Sheerneſs* in the county of *Kent.*" At the trial it was proved, that the houſe was ſituate in the pariſh of *Minſter*, which is contiguous to *Sheerneſs*; that *Sheerneſs* is extraparochial; but that both places uſually go by the name of *Sheerneſs*. A verdict having been found for the plaintiff, *Shepherd* Serjt. now moved for a rule *niſi*, to ſet it aſide and enter a nonſuit on the ground of the variance between the declaration and the evidence, arguing that though *Weſtminſter* uſually goes by the name of *London*, yet that it is not ſufficient ſo to lay it in pleading.

The Court (*abſente* EYRE Ch. J.) were of opinion that as the houſe was not ſtated to be in the *pariſh* of *Sheerneſs* it was well enough, ſince it appeared to be within the *diſtrict* of *Sheerneſs*.

Shepherd took nothing by his motion.

WEBB *v.* MATTHEW.

May 3d.

The Court will not permit a Defendant to juſtify bail after an action for an eſcape commenced againſt the ſheriff, who has neglected to take a bail-bond.

THE bail having been rejected, in this action, in which no bail-bond had been taken, the Plaintiff brought eſcape againſt the Sheriff.

Cockell Serjt. for the Defendant, now moved to juſtify new bail, which was oppoſed by

Marſhall Serjt. on two grounds: 1ſt, That the new bail were deſcribed in the notice as *added*, whereas both the former bail having been rejected, there was no bail in the cauſe to which they could be added (but this objection was immediately overruled by the Court): 2dly, That if the new bail were allowed, it would afford an anſwer to the action againſt the Sheriff which had been commenced on ſufficient ground: he cited *Fuller* v. *Preſt*, 7 *Term Rep.* 109.

Cockell contended, that *Fuller* v. *Preſt* did not apply, as in that caſe the application was made on the part of the Sheriff, who came to aſk a favour: but that here the Defendant not being implicated in

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the Sheriff's miſconduct ſhould not be prevented from defending the action.

The Court ſaid, that as an action for an eſcape had been commenced againſt the Sheriff, if bail were now permitted to be put in, the proceedings in that action muſt be ſtayed: and that this motion therefore ought to be conſidered in the ſame light as an application on the part of the Sheriff to ſtay proceedings againſt him in the action for the eſcape. That as the Sheriff had neglected to do his duty, he ought not to be relieved, for the Court could not too ſtrongly mark his conduct in omitting to follow the directions of the ſtatute (*a*). If there was any reaſon for making a private engagement it ought to have been made to the Plaintiff.

Bail rejected.

(*a*) 23 *H.* 6. *c.* 9.

May 5th.

NORTON *v.* FAZAN.

Defendant's wife having committed adultery, he left her in his houſe with two children bearing his name, but without making any proviſion for her in conſequence of the ſeparation; ſhe continued in a ſtate of adultery; held that the huſband ſhould be liable for neceſſaries furniſhed to her unleſs it appeared that the Plaintiff knew or ought to have known the circumſtances under which ſhe was living.

ASSUMPSIT for neceſſaries ſold to the Defendant's wife and children.

Some time previous to the delivery of the goods, the Defendant having diſcovered that his wife kept up an adulterous intercourſe with another man, ſeparated himſelf from her, leaving her in poſſeſſion of the houſe which he had inhabited, together with two children bearing his name. In this houſe ſhe was living in a ſtate of adultery, at the period when the goods in queſtion were delivered. The Defendant had made no regular proviſion for his wife. The cauſe was tried before *Eyre* Ch. J. at the Sittings at *Weſtminſter* in *Eaſter* Term, who was of opinion that if the Plaintiff knew or ought to have known that the ſeparation proceeded from the adultery of the wife, the jury ſhould find for the Defendant; if not, that the Plaintiff was entitled to recover. Verdict for the Plaintiff 2*l.* 10*s.*

Clayton Serjt. now moved for a rule calling on the Plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit be entered. He contended, that whether the Plaintiff had notice of the adulterous intercourſe or not was immaterial, and cited *Morris* v. *Martin*, 1 *Str.* 647. *Manwaring* v. *Sands*, 1 *Str.* 706. and *Bovier* v. *Hancock*, 6 *Term Rep.* 603. and that as the ſeparation was notorious, and the adultery committed during the ſeparation, the Defendant was diſcharged.

EYRE Ch. J. If the Defendant in another action brought againſt him by ſome other tradeſman ſhall be able to eſtabliſh the notoriety of his wife's ſituation, he may defend himſelf. But as the caſe ſtands at preſent this woman appears to have been living in a houſe in which ſhe was placed by the defendant himſelf, together with two children bearing the huſband's name, both of whom were born in wedlock. It is true that ſhe had an adulterous intercourſe with another man, but that was not proved to be known to this tradeſman. If the defendant can bring it home to any other tradeſman who ſhall be in the ſame ſituation as the preſent Plaintiff, that he did know or ought to have known the circumſtances under which the wife was living, the Defendant may perhaps be able to prevent another verdict paſſing againſt him.

BULLER J. Every caſe on the facts is peculiar to itſelf, and this is ſo different from every other caſe which has been decided in *Weſtminſter-hall* that I conſider it as anomalous. The verdict is clearly and ſtrictly right. The wife committed adultery for a conſiderable time while ſhe was living with her huſband; he voluntarily yielded his bed to the adulterer and made no proviſion for her. Then what colour of defence is left? Knowing of her criminal conduct and having made no proviſion for her, he muſt maintain her as before.

HEATH J. I am of the ſame opinion.

ROOKE J. I am of the ſame opinion.

Clayton took nothing by his motion.

GREEN *v.* REDSHAW.

May 5th.

If an affidavit to hold to bail is entitled, it is bad. The Court will never allow a ſupplemental affidavit except to explain an ambiguity in the original affidavit.

THE affidavit to hold to bail in this caſe was entitled "*William Green* Plaintiff againſt *James Redſhaw* Defendant" but in the body of the affidavit it was ſtated, that *James Redſhaw*, without adding the word "Defendant," was indebted &c.

A rule *niſi* for entering a common appearance having been obtained on the ground of the affidavit being entitled,

Clayton Serjt. now ſhewed cauſe, and contended that as the affidavit was poſitive that *James Redſhaw* was indebted, the title alone would not vitiate it, and that none of the caſes went that length.

But the Court thought the objection good, ſaying that it was in conſequence of a deciſion of this Court that the Court of *King's*

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Bench had made a rule (*a*) that no affidavits to hold to bail ſhould be entitled.

Clayton then applied for leave to file a ſupplemental affidavit; and cited *Hollis* v. *Brandon* (*b*).

Sed per EYRE Ch. J. The Court will never receive a ſupplemental affidavit unleſs to ſupply ſomething which is ambiguous on the face of the original affidavit; and which the Court for its own ſatisfaction wiſhes to have explained; and on this ground proceeded the offer of leave to file a ſupplemental affidavit in *Hollis* v. *Brandon*. But if it were allowed in this caſe, it would be making that right which was wrong at the time when it was done; and would be in the nature of an amendment.

Per Curiam, Rule abſolute.

(*a*) Vid. *Clarke* v. *Cawthorne*, 7 *Term Rep*. 321. and *Reg. Gen. Trin.* 37 *Geo*. 3. *B. R.* 7 *Term Rep*. 454.

(*b*) *Ante*, p. 36.

May 8th.

MADDOCKS *v*. HOLMES and others.

The Court will not reſtrain a Defendant from pleading the Statute of Limitations on ſetting aſide a regular interlocutory judgment.

SHEPHERD Serjt. having moved for a rule *niſi* to ſet aſide a regular interlocutory judgment which had been ſigned in this caſe for want of a plea, on the terms of paying the coſts, pleading *inſtanter*, taking ſhort notice of trial for the Sittings after Term, and giving judgment as of the Term;

Marſhall Serjt. ſaid, he was inſtructed to oppoſe this motion in the firſt inſtance unleſs the Defendants ſhould be reſtricted from pleading the Statute of Limitations, and cited *Willett* v. *Atterton*, 1 *Bl*. 35. to ſhew that the Court never let in that plea where they ſet aſide a regular judgment (*a*).

But the Court ſaid, that the plea of the Statute of Limitations was not neceſſarily unconſcientious, and that of late it had been conſidered as a fair plea in the *King's Bench* (*b*), though formerly it had been thought otherwiſe.

Rule abſolute on the terms propoſed.

(*a*) See alſo *Forbes* v. *Ld. Middleton*, 2 *Str*. 1242.

(*b*) *Rucker* and another v. *Hannay* Bart. 3 *Term Rep*. 124.

GRINDLEY and another *v.* BARKER and others.

May 10th.

If a power of a public nature be committed to ſeveral, who all meet for the purpoſe of executing it, the act of the majority will bind the minority.
A condemnation by four out of the ſix triers of leather, appointed under 1 *Jac.* 1. *c.* 22. (the whole number being met for the purpoſe of trying,) muſt be conſidered as the condemnation of all ſix.

TRESPASS for ſeizing detaining and converting certain hides of leather the property of the Defendants.

Plea, juſtifying the ſeizure and detainer for that after the making of 1 *Jac.* 1. *c.* 22. entitled an act concerning tanners curriers ſhoemakers and other artificers occupying the cutting of leather to wit on &c *John Barker John Pym Robert Pownds* and *John Matthiſon* (the Defendants) and alſo *Henry Matchwick John Thomas Wolley Thomas Slack* and *Thomas Mead* being ſubſtantial honeſt and expert perſons and being freemen of ſome of the companies of cordwainers curriers ſaddlers or girdlers within the city of *London* that is to ſay the ſaid *John Barker* being a freeman of the company of curriers &c &c (averring the companies to which each belonged) were duly appointed according to the form of the ſaid act of parliament by *William Curtis*, he the ſaid *W. C.* then being Lord Mayor of the City of *London*, and the Aldermen of the ſaid city for the time being, ſearchers to view and ſearch all and every tanned hide ſkin or leather which ſhould be brought as well to the market at *Leadenhall*, as to any other fair or market therefore uſually appointed within three miles of the ſaid city, of whom the ſaid *Thomas Mead* was then and there duly appointed a ſealer, and were afterwards on &c duly ſworn before the ſaid *W. C.* and the ſaid aldermen to do their office truly; and that afterwards and while they continued ſuch ſearchers as aforeſaid to wit on &c. the ſaid hides of tanned leather above-mentioned were offered and put to ſale by the Plaintiffs, the ſaid Plaintiffs then and there uſing the myſtery of tanning in the market of *Leadenhall* in the ſaid act mentioned being within the juriſdiction of the ſaid city: And the Defendants further ſay, that the ſaid hides had not after the tanning thereof been well and thoroughly dried, according to the intent and meaning of the ſaid act: wherefore the ſaid Defendant ſo appointed and ſworn as aforeſaid on &c at the market of *Leadenhall* aforeſaid and within the juriſdiction of the ſaid city by virtue of their ſaid office ſeized and carried away the ſaid hides of tanned leather above-mentioned, and detained them in their cuſtody until they might be duly tried in manner and form as is directed by the ſaid ſtatute as it was lawful for them to do: and the Defendants ſay that within a reaſonable and convenient time after the ſaid ſeizure to wit on *&c.* they the ſaid Defendants gave notice to *Brook Watſon* Eſq. he the ſaid *B. W.* then being Lord Mayor of the ſaid city, of their having ſo taken and ſeized the ſaid hides for the cauſe aforeſaid, in order that the ſaid Lord Mayor might in due manner appoint triers for the trying of the ſame according to the directions of the ſaid ſtatute to wit at *&c* which is the ſaid treſpaſs *&c* And this *&c* Wherefore *&c.*

Replication tendering iſſue on the fact of the hides not being well dried. New aſſignment, that after the ſeizure of the ſaid hides of leather and within ſix days after notice thereof had been given to the ſaid Mayor of the ſaid city to wit on *&c* the ſaid Mayor according to the form of the ſaid act did in due manner elect and appoint ſix honeſt and expert men to wit *Joſeph Lacey*, *George Murray*, *Edmund Sylveſter*, *Samuel Norris*, *Samuel Brooks* and *William Webſter*, the ſaid *J. L.* and *G. M.* then and there being of the better ſort of the company of cordwainers, the ſaid *E. S.* and *S. N.* then and there being of the better ſort of the curriers of *London*, and the ſaid *S. B.* and *W. W.*, then and there being of the better ſort of tanners uſing *Leadenhall* market, and no one of them being of kin or affinity to the ſaid Plaintiffs as triers for the trying, amongſt others, of the ſaid hides ſo ſeized as aforeſaid; which ſaid ſix perſons according to the ſaid act of parliament upon their corporal oaths taken before the ſaid Mayor did on the ſecond market day holden upon the *Tueſday* for leather next after the ſaid ſeizure in the afternoon of the ſame day being the —— day *&c* to wit at *&c* inquire ſtraightly examine and try whether the ſaid hides were ſufficiently ſerviceable or not according to the intent and true meaning of the ſaid act: And the ſaid Plaintiffs ſay that upon ſuch inquiry examination and trial the ſaid *S. B.* and *W. W.* differed from the ſaid four other perſons ſo appointed triers as aforeſaid with reſpect to the verdict which ought to be given concerning the ſaid hides and the ſaid *S. B.* and *W. W.* then and there refuſed to find the ſame inſufficient or unſerviceable, and the ſaid hides were found and returned inſufficiently dried and accordingly condemned by the ſaid *J. L. E. S. G. M.* and *S. N.* only, without the concurrence of and in oppoſition to the ſaid *S. B.* and *W. W.* and no other trial finding or adjudication hath been had or given in relation to the ſaid hides. Of all which premiſes the ſaid Defendants afterwards and before the commencement of this action to wit on *&c* at *&c* had notice. And the ſaid Plaintiffs further ſay that they brought this action not only for the treſpaſſes in the introductory part of the plea mentioned and thereby attempted to be juſtified but alſo for that the ſaid Defendants after the ſaid *S. B.* and *W. W.* had refuſed to find the ſaid hides of tanned leather to be inſufficient or unſerviceable, and alſo after the ſaid Defendants had ſuch notice as aforeſaid, to wit, at, *&c.* kept and detained the ſaid hides for a long ſpace of time, to wit, *&c.* and converted and diſpoſed of the ſaid hides to their own uſe in manner and form as the ſaid Plaintiffs have above thereof complained againſt them. Which ſaid treſpaſſes above newly aſſigned are other and different, *&c.* wherefore, *&c.*

Pleas to the new aſſignment; 1ſt, Not guilty; 2dly, That the Defendants being ſuch ſearchers as aforeſaid, and having ſo as aforeſaid ſeized the ſaid hides, ſo as aforeſaid offered to ſale by the ſaid Plaintiffs in the market of *Leadenhall* in the City of *London* by virtue of the ſaid ſtatute afterwards and after the ſame had been ſo as the ſaid Plaintiffs have above alleged found by the ſaid triers appointed as aforeſaid and the ſaid Plaintiffs had by reaſon thereof forfeited and loſt the ſame, the Defendants kept and detained the ſame in order that the ſaid hides ſo forfeited, being leather ſeized within the City of *London*, by virtue of the ſaid ſtatute might be brought to *Guildhall* in *London* there to be prized by indifferent perſons in manner and form as is by the ſaid ſtatute directed; as it was lawful for them to do, to wit, at, *&c.* which are the ſame ſuppoſed treſpaſſes, *&c.* and this, *&c.* wherefore, *&c.*

General demurrer and joinder.

This demurrer was twice argued; firſt in *Hilary* Term laſt by *Shepherd* Serjeant for the Plaintiffs and *Le Blanc* Serjeant for the Defendants, and now in this Term by *Cockell* Serjeant for the former and *Adair* Serjeant for the latter.

Arguments for the Plaintiffs. The only queſtion ariſing on theſe pleadings is, Whether the condemnation by four only of the triers was ſufficient to warrant the detention of the leather? This will turn principally on the conſtruction of 1 *Jac.* 1. *c.* 22. By the preamble it appears that the former ſtatutes upon this ſubject had been too ſharp and rigorous and that the Legiſlature intended that the goods of the ſubject ſhould not be condemned unleſs by the concurrent opinion of the three branches of the trade, *viz.* the tanner, the currier, and the cordwainer, or at leaſt by a majority compoſed of perſons in thoſe three branches of the trade. The object of the act as we may collect from *ſ.* 6. and 25. was to keep the three branches of the trade diſtinct, and thus to prevent any bad leather being brought into the market, by making

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each of them a check upon the others. Where the act has given powers to any number of perſons, it has cautiouſly expreſſed whether thoſe powers were to be executed by the whole number only, by a majority, or by any particular individuals. Thus by *ſ.* 15. it is directed that "ſo much of the hide, *&c.* as ſhall be inſufficiently tanned or dried ſhall be cut out by the overſight diſcretion and direction of the *triers* hereafter in this act to be appointed, upon the oaths of the ſaid triers." So offences againſt *ſ.* 21. are to be tried "by the wardens of the curriers and the wardens of the Company whereof the party grieved ſhall be;" in which caſe it can never be contended that a majority of the curriers only would be ſufficient. But in *ſ.* 24. it is provided that curried leather ſhall be ſearched and allowed "by the curriers of *London* for the time being *or ſuch perſons as they ſhall thereto aſſign.*" So the ſame expreſſion is uſed in *ſ.* 27. And in *ſ.* 29. it is directed that "the Maſter and Wardens of the cordwainers, curriers, girdlers and ſadlers, *or the more part* of the ſaid Maſter and Wardens of every of the ſaid ſeveral myſteries ſhall make true ſearch," *&c.* Thus too *ſ.* 31. having directed that eight perſons ſhould be appointed as ſearchers and ſealers generally, it is added in *ſ.* 32. "that the ſaid ſearchers *or any of them*" may ſeize. The 33d *ſect.* of the act by which the triers are appointed, following up the idea of the preamble which had expreſſed that the trade had been oppreſſed by ſome laws that were too rigorous, enacts that to the end there might be an indifferent trial, the triers ſhould be ſelected two from each branch of the trade, and very much aſſimilates them to a jury; they are not to be of kin or affinity to the owner of the leather, and they are upon their corporal oaths "to inquire, ſtraightly examine, and try." Nor is it unreaſonable to ſuppoſe that the Legiſlature intended all ſix to be unanimous, when the common law has in the caſe of a jury required the unanimity of twelve. This too is ſtrengthened by the words at the end of *ſ.* 35. which directs that the perſons appointed for trial of the leather ſhall do their duties therein without delay, "upon pain that every of them making default therein ſhall for every ſuch ſeveral default forfeit and pay 5 *l.*" This proviſion was probably added in contemplation of the triers not coming to an agreement. Suppoſing however that a majority of the triers may decide, ſtill as the Legiſlature has anxiouſly compoſed this tribunal of the three branches of the trade whoſe united ſkill and experience would beſt enſure a juſt verdict; that majority muſt be compoſed of one at leaſt of each of thoſe three branches; whereas upon the preſent pleadings it appears that the condemnation in queſtion was made by the two curriers and the two cordwainers, excluſive of the two tanners. There is no inſtance in which the majority of a number of perſons appointed to try a fact can determine the queſtion. In the Courts of Law though a majority of the judges decide, ſtill they decide upon a queſtion of law and not of fact, which makes a material diſtinction. Nor is there any analogy between this and the caſe of corporations; whoſe acts are either legiſlative or miniſterial, relate to their own intereſts only and do not take away the rights of other perſons, as the act of the majority in this inſtance does. In the caſe of elections the majority muſt of courſe bind the reſt. Generally ſpeaking however where any number of perſons are appointed to do a particular act, they muſt all join. Thus in the *King* v. *Hobbes*, *Noy*, 47. where a commiſſion made out to ſix, four or two, was executed by three, the execution was held void, and *Co. Litt.* 181. *b.* was there cited (*a*). It is obſervable alſo that where any number of perſons are appointed by act of parliament, the majority of whom are intended to act, it is always ſo expreſſed.

Arguments for the Defendants. Three points are to be conſidered in this queſtion. 1ſt, What is the general rule of law reſpecting authorities of this nature? 2dly, Whether any particular intent can be collected from this act to control the general rule of law? 3dly, Whether, if a majority can decide, one of each claſs compoſing the tribunal muſt not concur in the deciſion? 1ſt, There is no inſtance except that of a petty jury where unanimity is required in the exerciſe of a diſcretionary authority, and according to *Dyer* 218. in marg. and *Hale P. C.* 297. *n.* (*c*), it was not formerly required even in that caſe. So unanimity is not required from a grand jury, though twelve muſt concur. Beſides, the triers in this caſe cannot be reſembled to a jury as they are not aſſembled in the ſame manner, they are judges as well as jurors, there is no challenge and no means of keeping them together in order to make them agree. They moſt reſemble the

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(*a*) *Shepherd* Serjeant mentioned a caſe which he ſaid had been decided in K. B. about three years back, of ——— v. *Bland*; that was an action on a bond given by the Defendant as ſecurity for a collector of the rates in *St. Andrew's*, *Holborn*; the local act had directed that the collector ſhould be nominated by the commiſſioners, five of whom ſhould be a quorum; the collector was elected by three, and it was held on a motion for a new trial that the ſurety was not liable, as the collector was not duly appointed. But *Eyre* Ch. J. ſaid, that if the appointment had been made by three, at a board conſiſting of five, he ſhould have thought the appointment good.

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the homage of a Court Baron where the ſuitors are judges and jury, and the verdict of the majority binds. Where a miniſterial act is to be done, or a naked authority to be executed, the concurrence of all thoſe to whom the authority is committed, is required. Nor is the diſtinction between the two ſpecies of authorities, *viz.* thoſe which are diſcretionary and thoſe which are merely miniſterial, without good reaſon. In the latter caſe, where unanimity is required, the law provides the means of compelling it; as in caſes of private truſts, by the interference of the Court of Chancery, and of public ones by *mandamus* from the King's Bench; but there are no legal means of obliging men to act contrary to their judgment. By analogy to the caſe of elections it may be contended that this judgment is the judgment of all the ſix triers; for there a majority has no other way of over-ruling the opinion of the minority but by voting on the oppoſite ſide; if they give a mere negative they muſt be taken to have virtually conſented. The *King* v. *Foxcroft*, *Burr.* 1017. and *Rex* v. *Withers*, *Paſch.* 8 *Geo.* 2. *B. R.* cited by *Wilmot* J. *Burr.* 1020. In the new aſſignment it is ſtated that the two *refuſed* to concur and that the four found a verdict, and in the plea to the new aſſignment it is averred that the hides were found "by the ſaid triers appointed as aforeſaid" to be inſufficient. If therefore conſiſtently with the allegation of the Plaintiff this verdict can be conſidered as the finding of all the triers it muſt ſo be taken; and on the authority of the above caſes it is clear that if four find, and two refuſe, the finding muſt be held the finding of the ſix. It has been decided in the caſe of a corporation, *Attorney General* v. *Davy*, 2 *Atk.* 212. that a majority may act, though nothing be mentioned in the charter, of the major part: and in the *King* v. *Beeſton*, 3 *T. R.* 592. and *Witnell* v. *Gartham*, 6 *T. R.* 398. which were not caſes of corporations, the acts of a majority were held ſufficient. In the former of thoſe caſes arguments *ab inconvenienti* were admitted, and in the latter Mr. J. *Lawrence* ſtated it as a general principle, that "where a body of perſons is to do an act, the majority of that body will bind the reſt." 2dly, The rigour complained of in the preamble does not relate to any mode of trial, but to certain acts which by former ſtatutes were required to be done, and which could not be done. No argument can be drawn from *ſ.* 15. for as the word "triers" is there uſed generally, the ſame conſtruction which applies to the clauſe in queſtion will apply to that. Admitting that all the clauſes, where the major part is not mentioned, muſt be underſtood in the ſame manner, a ſtrong argument in favour of the Defendant may be drawn from *ſ.* 22. for the act required to be done is to be done by the wardens of two companies, who are ſelect parts of two corporate bodies; and where an act is to be done either by a corporation or a ſelect part of it, it is clear that a majority will bind: and though in this particular caſe it appears that the judgment cannot be given by the wardens of the curriers only, becauſe the wardens of each company are to be conſidered as one arbitrator, and where there are two arbitrators, both muſt join; yet the opinion of the wardens of each company muſt be determined by the majority. So the acts to be done under ſections 24 and 27 are to be done by ſelect parts of corporate bodies, and the ſame obſervation will therefore apply. The reaſo why "the more part" was mentioned in ſection 29, was not to give a power to the majority which they had not before, but to obviate a doubt which might ariſe, whether every one of the perſons there mentioned would not be liable to a penalty if he did not go out four times in every year to view, *&c.* Nothing therefore appears on the face of the act to ſhew an intention in the Legiſlature to control the general rule of law: nor has the particular clauſe by which the triers are conſtituted, kept in view the trial by jury as has been contended, having omitted one of its moſt leading features, the right of challenge. 3dly, Though the triers are made to conſiſt of equal numbers of each of the three trades, yet this appears to have been done with no other object than to compoſe a tribunal whoſe members ſhould be acquainted with every ſtate in which the leather might be when it came to be tried. The members belonging to one trade are to aſſiſt thoſe of the other two by their information, and then the whole is to give one general verdict for the public: if it were otherwiſe it would be in the power of the members of either of the three trades to control the acts of the other two, in order to favour the members of their own trade, whoſe wares might come before them to be tried.

Reply. The *King* v. *Foxcroft* differs from this caſe: for the electors being met were bound to vote for ſome perſon if they meant to exerciſe their franchiſe; whereas here the triers being met to try a particular queſtion, four gave an opinion in the negative and two in the affirmative. In the *King* v. *Withers* ſome of the electors voted for two perſons when there was but one vacancy, and

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and therefore their votes were thrown away. The conſtruction of 9 *Geo.* 1. *c.* 7. in the *King* v. *Beeſton* was expreſsly made with reference to the 43 of *Eliz.* the poor laws being all *in pari materiâ.* And the judgment of the Court in *Wittnell* v. *Gartham* did not proceed on the words of the ſtatute but on three other grounds: *viz.* The intent of the founder, the reſemblance of the body to a corporation, and uſage.

EYRE Ch. J. The true queſtion in this caſe lies in a very narrow compaſs; it is this: What is the operation in law of a judgment of four out of ſix triers, ſix being the number conſtituted to be the triers, and the ſix being aſſembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred then this leather is not found inſufficient, but if the operation of law on the finding of four, who are the majority of the body duly aſſembled, be, that their judgment is the judgment of the whole and therefore the judgment of the triers; then the leather muſt be taken to have been found inſufficient, and the Defendants are juſtified. On the firſt argument I thought this queſtion would turn on two general heads of inquiry. 1ſt, What the general rule of law was in the caſe of bodies of men entruſted with powers of this nature; whether they muſt all concur or whether the deciſion of the majority would bind the whole? 2dly, Suppoſing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legiſlature as collected from the ſcope and proviſions of this act?

With reſpect to the firſt queſtion, I think it is now pretty well eſtabliſhed that where a number of perſons are entruſted with powers not of mere private confidence, but in ſome reſpects of a general nature, and all of them are regularly aſſembled, the majority will conclude the minority, and their act will be the act of the whole. The caſes of corporations go further: there it is not neceſſary that the whole number ſhould meet; it is enough if notice be given; and a majority, or a leſſer number according as the charter may be, may meet, and when they have met they become juſt as competent to decide as if the whole had met. With a view to this caſe thoſe who have met reſemble the ſix triers who have authority to decide: and then a queſtion ariſes, how they may act when they have met. The caſe in *Atkyns* ſhews the opinion of a great Judge, Lord *Hardwicke*, who was much converſant with this ſubject in one part of his judicial life, that the majority of perſons aſſembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the Law of Corporations applies to this caſe; that with regard to powers not merely private, which are to be exerciſed by many perſons, provided a ſufficient number be aſſembled, the act of the majority concludes the minority and becomes the act of the whole body. If that be ſo, the argument drawn from the word "triers" being uſed generally, in the 33d and 46th ſections, will not ſtand much in our way: becauſe the judgment of four triers in this caſe is the judgment of all, as much as if all had concurred. There is nothing then in the general rule of law to prevent this finding from being held good. But the queſtion is ſtill open, whether on the conſtruction of this particular ſtatute, it does not appear that not only all the perſons muſt be aſſembled, but that every one of them ſhould concur, or at leaſt that one of each claſs ſhould concur. There was ſomething very plauſible in that laſt argument, but I am now clearly ſatisfied, either that all muſt concur, or that a majority may decide for the whole. There is nothing in the act which neceſſarily leads to a conſtruction, that the majority muſt be compoſed in any particular manner. With regard to the general queſtion, it has been argued moſt weightily, that as the leather might be ſeized in all the ſtages of the manufacture, it was right that the authority which was to determine ſhould be delegated to perſons of all the different trades, in order that the body might be aided and aſſiſted by the united experience of all the branches, whenever the inquiry ſhould come before them. But it ſtruck me that when the body was ſo conſtituted and had aſſembled, and could have the aſſiſtance of the united experience of all, the neceſſity of all concurring in the final judgment was not ſo apparent, and might be attended with inconvenience. It is indeed a truth, that in a body compoſed of three claſſes of trade, thoſe who are of the particular trade of which the owner of the goods happens to be, may feel an inclination to favour the members of their own trade, and may heſitate to condemn, when they themſelves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, ſince the ſearchers are obliged to execute a public duty, and the validity of their acts muſt depend upon the judgment of the triers (*a*). It ſeems better that when all the knowledge which each claſs can afford has been communicated, the

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(*a*) *Warne* v. *Varley*, 6 *Term Rep.* 443.

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whole ſhould be governed by the majority. This caſe has been compared to the caſe of juries, and in many reſpects it is analogous; but in an abundance of particulars it is unlike. On the abſtract queſtion it has often been debated, whether there is policy and good reaſon on the ſide of the rule which requires unanimity in a jury. However good therefore the rule may be found in practice when applied to juries, yet if it be doubtful in theory we ought not to force the analogy, and apply the rule to other caſes where it may be found inconvenient. It is impoſſible that bodies of men ſhould always be brought to think alike: there is often a degree of coercion, and the majority is governed by the minority, and *vice verſâ*, according to the ſtrength of opinions, tempers, prejudices, and even intereſts. We ſhall not therefore think ourſelves bound in this caſe by the rule which holds in that. I lay no great ſtreſs on the clauſe of the act which appoints a majority to act in certain caſes, becauſe that appears to have been done for particular reaſons which do not apply to the ultimate tiral: it relates only to the aſſembling the ſearchers; now there is no doubt that all the ſix triers muſt aſſemble; and the only queſtion is, what they muſt do when aſſembled? We have no light to direct us in this part, except the argument from the nature of the ſubject. The leather being ſubject to ſeizure in every ſtage of the manufacture, the tribunal ought to be compoſed of perſons ſkilful in every branch of the manufacture. And I cannot ſay there is no weight in the argument, drawn from the neceſſity of perſons concurring in the judgment, who are poſſeſſed of different branches of knowledge, but ſtanding alone it is not ſo concluſive as to oblige us to break through a general rule: beſides it is very much obviated by this conſideration, that when all have aſſembled and communicated to each other the neceſſary information, it is fitter the majority ſhould decide than that all ſhould be preſſed to a concurrence. If this be ſo, then the reaſons drawn from the act, and which have been ſuppoſed to demand, that the whole body ſhould unite in the judgment, have no ſufficient avail, and conſequently the general rule of law will take place; *viz.* that the judgment of four out of ſix being the whole body to whom the authority is delegated regularly aſſembled and acting, is the judgment of all.

BULLER J. The firſt queſtion to be conſidered in this caſe is, what is the legal effect and underſtanding of the facts diſcloſed upon this record, and I think this point has been extremely well argued by my Brother *Adair*, whoſe argument, together with the authorities which he has cited, has convinced my mind, that ſitting here, we muſt pronounce this to be the finding of all the ſix triers.

This is a caſe in which ſix perſons are united together as one body, and are required by the act to form an opinion. They are not permitted to ſay we will form no opinion, but they muſt decide whether the leather be ſufficient and ſerviceable or not. Four of them expreſsly decide that it is not; the other two do not agree in that finding, but they do not diſſent: and I take it that in ſuch a caſe, where the law compels perſons convened under an oath to form an opinion, if any of them do not pronounce againſt the opinion of the majority, they find for it. If that be ſo, it puts an end to this caſe, for if it is to be underſtood, upon this record, that this judgment has the effect of a judgment of the ſix triers, no queſtion remains to be conſidered.

But upon the act two queſtions ariſe: 1ſt, Whether all the ſix triers muſt concur in their judgment, or whether a majority are ſufficient to decide? 2dly, If a majority can decide, what that majority muſt conſiſt of? Now it ſeems to me, that upon the firſt queſtion the authority of *Co. Litt.* if we went no further, is deciſive, becauſe it is there ſaid in expreſs terms that in matters of public concern the voice of the majority ſhall govern. It is to be remembered, that not a ſingle caſe, not a dictum has been quoted on the other ſide of the queſtion, and that this ſtands wholly uncontradicted. In the next place I think there is great weight in ſome of the caſes which have been mentioned, and that the concluſion to be deduced from them goes much further than has been admitted. *Wittnell* v. *Gartham* was ſaid to have been decided upon three different grounds: 1ſt, Upon the founders intent; 2dly, On a reſemblance to the caſe of corporations; and 3dly, Upon uſage. One thing is clear from this authority, that a deed which ſpeaks in general terms, giving a power to a certain number of perſons, does not neceſſarily import that all theſe perſons ſhall concur, becauſe if that were neceſſarily the legal conſtruction of the deed, uſage would be laid out of the queſtion. Then we have got thus far upon this caſe, that a deed which gives a power to a certain number of perſons may admit of two conſtructions; either that all muſt join in the act or that the majority may do it; in no other way could uſage be admitted; uſage being admitted, it certainly had its effect in that caſe. The caſe therefore is open to the argument of inconvenience, which was ſlightly touched upon: for

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for if the act admits of two conſtructions, certainly the argument of inconvenience applies. Now if it be neceſſary that all ſhould concur, one man may deſtroy the determination of five, though that one may be the leaſt qualified of the whole ſix to judge; and the conſequence will be, that if the defect be in the tanning of the leather, and by the tanners and the cordwainers opinions it be pronounced inſufficient, yet if one currier declare it to be ſufficient, the judgment of the others will not avail. Why, that is unreaſonable upon the face of it, and therefore ſuch a conſtruction cannot be adopted. It ſeems to me therefore upon the whole view of the caſe, that the majority of the ſix muſt decide. With reſpect to that majority being compoſed in any particular way, I can ſee nothing in the ſtatute which warrants ſuch an idea.

HEATH J. I am of the ſame opinion, and as the caſe has been ſo fully entered into, I ſhall very ſhortly deliver the reaſons on which my opinion is founded. In the firſt place a queſtion has been made, whether or no a power requiring in the exerciſe of it ſkill and diſcretion, being delegated to a certain number of men, ought to be exerciſed by all, or whether it is ſufficient that it ſhould be exerciſed by the majority of them? I do not think that either of the three caſes cited at the bar, either the caſe out of *Atkyns*, or the two caſes out of the *Term Reports*, directly go to prove the propoſition contended for by the Plaintiffs; becauſe thoſe deciſions might have been maintained upon other grounds, for I obſerve that in all the three caſes the powers in queſtion were new powers delegated to bodies of men, in which by ſeveral ſtatutes and the common law the acts of the majority conclude the minority; it might therefore be conſidered that the new power ought to be exerciſed exactly in the ſame way as the old power would be. However, we find ſome dicta of very great reſpectability, *viz.* of Lord *Hardwicke*, and the Judges who preſided in the *King's Bench*, to ſhew that as well upon common law and common reaſon as upon the particular circumſtances of the caſes before them, the acts of the majority concluded the minority. Then the queſtion has been argued upon the different clauſes of the ſtatute, and it ſeems to me, that a very good anſwer has been given to theſe clauſes. All muſt concur in trying, and then though they be of different opinions, ſome of one opinion ſome of another, yet all having tried, the majority ſhall bind.

Though we have no particular deciſions directly in point, yet there are ſome uſages and ſome received opinions which are equivalent to deciſions.—We know very well that in all commiſſions of oyer and terminer and gaol delivery, and of the peace, where a quorum is conſtituted, and it is neceſſary that a quorum ſhould be preſent to do the acts for which they are appointed, yet if the quorum are in the minority, the majority ſhall conclude the minority. For theſe reaſons I concur in opinion with his Lordſhip and my Brother.

Rooke J. I might reſt ſatisfied with deciding on the particular circumſtances of this caſe, and if I did, I ſhould agree, that after the authority of the *King* v. *Foxcroft*, four having abſolutely found in this caſe, and the two others having only refuſed to concur, will amount to a finding by the whole body. But as that might lay a ground for further litigation, I think it right to be more explicit. I think the words of the ſtatute are at leaſt doubtful, and I am warranted in ſo thinking ſince the counſel have not confined themſelves to contending that the whole body muſt concur, but either the whole body or one of each claſs. The latter conſtruction ſeems extremely queſtionable, ſince the act makes no mention of the three claſſes, which in *ſ.* 24. appoints triers for the country, though they are to examine and try in the ſame way as thoſe in *London*. The authority given to the triers in the preſent inſtance is general to examine and try whether certain goods are ſerviceable or not, and is committed to them for the advancement of public juſtice, and as a public truſt. Now the deciſions are numerous (and may be found in *Viner*, title *Authority*, letter B) to ſhew that a different conſtruction prevails with reſpect to private authorities and authorities for the advancement of public juſtice. So alſo *Lambard* in his Juſtice of the Peace ſtates expreſsly that where a precept for keeping the peace is made jointly to twain, one alone may ſerve and execute that precept; following the rule laid down in *Co. Litt.* 181. *b.* If this be the caſe and we are not bound by the ſtrict words of the act, (which it ſeems agreed we are not,) but are to give the clauſes ſuch a conſtruction as will beſt advance the ends of public juſtice, there can be very little doubt how we ought to decide. We ſhall not advance public juſtice by ſaying that though a majority of the triers who have had the advantage of all the information to be derived from the whole ſix who compoſe the tribunal, are of opinion that the leather is unſerviceable, ſtill any one man ſhall have it in his power to prevent

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for if the act admits of two conſtructions, certainly the argument of inconvenience applies. Now if it be neceſſary that all ſhould concur, one man may deſtroy the determination of five, though that one may be the leaſt qualified of the whole ſix to judge; and the conſequence will be, that if the defect be in the tanning of the leather, and by the tanners and the cordwainers opinions it be pronounced inſufficient, yet if one currier declare it to be ſufficient, the judgment of the others will not avail. Why, that is unreaſonable upon the face of it, and therefore ſuch a conſtruction cannot be adopted. It ſeems to me therefore upon the whole view of the caſe, that the majority of the ſix muſt decide. With reſpect to that majority being compoſed in any particular way, I can ſee nothing in the ſtatute which warrants ſuch an idea.

HEATH J. I am of the ſame opinion, and as the caſe has been ſo fully entered into, I ſhall very ſhortly deliver the reaſons on which my opinion is founded. In the firſt place a queſtion has been made, whether or no a power requiring in the exerciſe of it ſkill and diſcretion, being delegated to a certain number of men, ought to be exerciſed by all, or whether it is ſufficient that it ſhould be exerciſed by the majority of them? I do not think that either of the three caſes cited at the bar, either the caſe out of *Atkyns*, or the two caſes out of the *Term Reports*, directly go to prove the propoſition contended for by the Plaintiffs; becauſe thoſe deciſions might have been maintained upon other grounds, for I obſerve that in all the three caſes the powers in queſtion were new powers delegated to bodies of men, in which by ſeveral ſtatutes and the common law the acts of the majority conclude the minority; it might therefore be conſidered that the new power ought to be exerciſed exactly in the ſame way as the old power would be. However, we find ſome dicta of very great reſpectability, *viz.* of Lord *Hardwicke*, and the Judges who preſided in the *King's Bench*, to ſhew that as well upon common law and common reaſon as upon the particular circumſtances of the caſes before them, the acts of the majority concluded the minority. Then the queſtion has been argued upon the different clauſes of the ſtatute, and it ſeems to me, that a very good anſwer has been given to theſe clauſes. All muſt concur in trying, and then though they be of different opinions, ſome of one opinion ſome of another, yet all having tried, the majority ſhall bind.

Though we have no particular deciſions directly in point, yet there are ſome uſages and ſome received opinions which are equivalent to deciſions.—We know very well that in all commiſſions of oyer and terminer and gaol delivery, and of the peace, where a quorum is conſtituted, and it is neceſſary that a quorum ſhould be preſent to do the acts for which they are appointed, yet if the quorum are in the minority, the majority ſhall conclude the minority. For theſe reaſons I concur in opinion with his Lordſhip and my Brother.

ROOKE J. I might reſt ſatisfied with deciding on the particular circumſtances of this caſe, and if I did, I ſhould agree, that after the authority of the *King* v. *Foxcroft*, four having abſolutely found in this caſe, and the two others having only refuſed to concur, will amount to a finding by the whole body. But as that might lay a ground for further litigation, I think it right to be more explicit. I think the words of the ſtatute are at leaſt doubtful, and I am warranted in ſo thinking ſince the counſel have not confined themſelves to contending that the whole body muſt concur, but either the whole body or one of each claſs. The latter conſtruction ſeems extremely queſtionable, ſince the act makes no mention of the three claſſes, which in *ſ.* 24. appoints triers for the country, though they are to examine and try in the ſame way as thoſe in *London*. The authority given to the triers in the preſent inſtance is general to examine and try whether certain goods are ſerviceable or not, and is committed to them for the advancement of public juſtice, and as a public truſt. Now the deciſions are numerous (and may be found in *Viner*, title *Authority*, letter B) to ſhew that a different conſtruction prevails with reſpect to private authorities and authorities for the advancement of public juſtice. So alſo *Lambard* in his Juſtice of the Peace ſtates expreſsly that where a precept for keeping the peace is made jointly to twain, one alone may ſerve and execute that precept; following the rule laid down in *Co. Litt.* 181. *b*. If this be the caſe and we are not bound by the ſtrict words of the act, (which it ſeems agreed we are not,) but are to give the clauſes ſuch a conſtruction as will beſt advance the ends of public juſtice, there can be very little doubt how we ought to decide. We ſhall not advance public juſtice by ſaying that though a majority of the triers who have had the advantage of all the information to be derived from the whole ſix who compoſe the tribunal, are of opinion that the leather is unſerviceable, ſtill any one man ſhall have it in his power to prevent a find-

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a finding by holding out againſt the reſt. All ſix muſt undoubtedly try; but it does not therefore follow that they muſt all decide the ſame way. Each man is after due examination and inquiry to decide according to the beſt of his judgment, and the queſtion is to be determined by the opinion of the majority.

Judgment for the Defendants.

May 11th.

DA COSTA *v.* DAVIS.

If the condition of a bond be to render a perſon in execution who has once been diſcharged, it is void. Condition to do one of two things; one becomes impoſſible, no reaſon for not performing the other.

DEBT on bond for 1460 *l.* dated 20th *July* 1797, and given by the Defendant and one *J. G. Kohn* to the Plaintiff to procure the releaſe of one *Edward May*, who was in execution at the ſuit of the Plaintiff. The condition was that if the obligors or the ſaid *Edward May* ſhould pay to the Plaintiff 730 *l.* and intereſt, on or before 10th *January* 1798; *or* if default ſhould be made in ſuch payment, then if the obligors ſhould, on the 12th *January* 1798, ſurrender the ſaid *Edward May* to the Plaintiff, at the houſe of one *Thomas Wright*, between the hours of twelve and two, ſo that he might be again taken in execution, the bond ſhould be void.

Plea. That before and at the time of making the bond, *May* was a priſoner in the *Fleet*, charged in execution at the ſuit of the Plaintiff and ſeveral others: that a little before the making of the bond, *May* requeſted the Plaintiff to diſcharge him from the ſaid execution at his ſuit, and offered the bond in queſtion as a ſecurity for his debt to the Plaintiff; which bond was accordingly given, and *May* was diſcharged from the execution at the Plaintiff's ſuit; but that the other creditors having refuſed to diſcharge him, he continued a priſoner, whereby the obligors were prevented from ſurrendering him at the time and place in the condition mentioned; that the obligors, before the day, gave notice to the Plaintiff that they could not ſurrender *May* according to the condition, but that *May* was then in the *Fleet*, and would be there on the 12th *January*, between twelve and two, and that the obligors would then and there render the ſaid *May*, ſo that he might be again taken in execution; and that the obligors on the 12th *January* were in the *Fleet*, and attended there between twelve and two, and then and there had the body of the ſaid *May*, and were ready to ſurrender and deliver him up to the Plaintiff, ſo that he might be again charged in execution, but that

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neither the Plaintiff or any perſon on his behalf was there to receive him. And this, *&c.* wherefore, *&c.*

General demurrer and joinder.

Le Blanc Serjt. for the Plaintiff contended, that no legal excuſe for non-performance of the condition was ſhewn by the plea.

Williams Serjt. *contrà* inſiſted, that the condition to ſurrender had been ſubſtantially performed, and cited *Freſhwater* v. *Eaton*, 1 *Str.* 49. where the condition of the recognizance was to ſurrender the principal to the keeper of the Palace court; a writ of error in the *King's Bench* having been brought, and the judgment below affirmed, a ſurrender to the Marſhal of the *Marſhalſea* was held a good performance of the condition of the recognizance.

The Court was of opinion on the authority of *Vigers* v. *Aldrich*, 4 *Burr.* 2482. that the firſt part of the condition was void, being to render a priſoner in execution who had been once diſcharged, and therefore as the other part had not been performed, the bond was forfeited. Beſides that where the condition of a bond is to do one of two things, ſhewing that one could not (*a*) be performed, is no good reaſon for not having performed the other.

Judgment for the Plaintiff.

(*a*) Unleſs it become impoſſible by the act of the obligee. *Com. Dig. Condition* (K. 2).

WHITELOCK Adminiſtrator, &c. and Others *v.* HEDDON and Others.

May 12th.

Teſtator deviſed "*all* his freehold, leaſehold, *&c.* eſtates" to *A.* in fee, provided that if *B.* ſhall have "any ſon or ſons," then "to ſuch male iſſue as *B.* ſhall have when *A.* attains twenty-one," but *A.* to have the rents and profits of the eſtates till he attains twenty-one; by a ſubſequent clauſe he gave "all the reſidue of his real and perſonal eſtates whatſoever, not before diſpoſed of, to *A.* his heirs, *&c.* for ever;" *B.* had one ſon who died before *A.* attained twenty-one, and a ſecond who was born three weeks after that period; held that the firſt ſon took nothing, but that the ſecond took an eſtate in tail male.

THIS was a caſe ſent under the direction of the Lord Chancellor for the opinion of the Judges of this court, which ſtated: that *Thomas Whitelock* (the teſtator) being ſeized of a leaſehold eſtate for three lives, under the Archbiſhop of *York*, and a ſmall freehold eſtate, made his will the 31ſt *Auguſt* 1778, by which after giving to his ſon *John Whitelock* an annuity of 20*l.* for life, charged on his freehold, leaſehold, and fountainſhold eſtates at *Monckton Mains*, and *Balderſby* in the county of *York*, and alſo a further annuity of 20*l.* for life, after the death of Mrs. *E. Beckwith* charged on the ſame eſtates, and alſo an an-

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nuity of 10 *l.* for life to his daughter *E. Heddon* wife of *W. Heddon* of *Balderſby*, Yeoman, charged on the ſame eſtates, and for her ſeparate uſe; he deviſed as follows: "Item I give " deviſe and bequeath unto my grandſon *John Heddon* ſon of " *W. Heddon* of *Balderſby* aforeſaid Yeoman all my freehold leaſe- " hold fountainſhold lands tenements hereditaments and eſtates " whatſoever to him his heirs and aſſigns for ever, ſave and ex- " cept as hereinafter mentioned, that is to ſay, provided that in " caſe my ſaid ſon *John Whitelock* ſhall have any ſon or ſons " begotten and born in lawful matrimony then I give deviſe and " bequeath all my ſaid freehold leaſehold fountainſhold lands " tenements hereditaments and eſtates whatſoever hereinbefore " given and deviſed to my grandſon *John Heddon* to ſuch male " iſſue as my ſaid ſon *John Whitelock* ſhall or may have at the " time of my ſaid grandſon *John Heddon* attaining the age of " twenty-one years, but I will order and direct that in caſe my " ſaid ſon *John Whitelock* ſhall have any male iſſue then I order " and direct that the ſaid *John Heddon* ſhall receive the rents and " profits of my ſaid freehold leaſehold fountainſhold lands tene- " ments hereditaments and eſtates whatſoever until he ſhall attain " the ſaid age of twenty-one years as above mentioned." He next proceeded to give ſeveral legacies to his grandchildren, the *Heddons*, to ſome of his friends, and to the poor of *Biſhop Monckton* in the county of *York*, and then deviſed thus: "Item " as to all the reſt and reſidue of my real and perſonal eſtates " of what nature or kind ſoever not hereinbefore diſpoſed of " I give deviſe and bequeath the ſame to my grandſon *John* " *Heddon* his heirs executors adminiſtrators and aſſigns for ever." *Thomas Whitelock* the teſtator died 28th *December* 1780, leaving *John Whiteloek* his only ſon and heir at law. The deviſed eſtates were taken poſſeſſion of for the uſe of *John Heddon* the firſt deviſee, till he attained the age of twenty-one years, and when that period arrived, *viz.* 21ſt *May* 1792, he entered on thoſe eſtates. After the death of *Thomas Whitelock* the teſtator, and before *John Heddon* attained the age of twenty-one, *John Whitelock* had a ſon born named *John*, who died when five weeks old, and before *John Heddon* attained twenty-one. At the time of *John Heddon* attaining the age of twenty-one, the wife of *John Whitelock* was *enſient* with a child which was born 3d *Auguſt* 1792, being ſomething leſs than three months after *John Heddon* attaining

ing the age of twenty-one. This child was chriſtened *Thomas*, and died 24th *January* 1795.

The queſtion for the opinion of the Court was, Whether the above-named *John Whitelock* the firſt ſon of the Plaintiff *John Whitelock*, or the ſaid *Thomas Whitelock* the ſecond ſon of the ſaid Plaintiff *John Whitelock*, or either of them, were or was entitled to any and what eſtate under the will of the ſaid *Thomas Whitelock* their grandfather in the eſtates thereby deviſed?

Le Blanc Serjt. for the Plaintiff. The words of the will, "at the time of my ſaid grandſon *John Heddon* attaining the "age of twenty-one years" are not deſcriptive of the perſons who are to take, but only of the time at which they are to take. If this be true, then an intereſt veſted in the eldeſt infant *John Whitelock* as ſoon as he was born. At any rate however the ſecond ſon *T. Whitelock*, who was in *ventre ſa mere* at the time of *John Heddon*'s attaining his age of twenty-one, comes within the deſcription of the above words. *Doe* d. *Clarke* v. *Clarke*, 2 *H. Bl.* 399. *Doe* d. *Lancaſhire* v. *Lancaſhire*, 5 *T. R.* 49. *Miller* v. *Turner*, 1 *Vez.* 85. (*a*) (the Court ſaid that point need not be contended, as it was now fully ſettled). However it is immaterial which of the ſons did take; I only contend that if either took, the eſtate given was a fee. The teſtator deviſed all his eſtates to his grandſon by his daughter, but foreſeeing that his ſon might have a ſon, he meant to ſubſtitute that ſon, if any ſuch there ſhould be, in the place of the firſt deviſee, who was then living. Now if the ſons of the ſon ſhall not be held to have taken a fee, they will have a leſs eſtate than the ſon of the daughter. Beſides a deviſe "of "all my eſtate or eſtates" will carry a fee unleſs the Court ſees words to narrow the conſtruction. As to the ſuppoſed words of limitation which are ſuperadded; "male iſſue" may be conſtrued either as words of purchaſe or limitation, according to the intent of the teſtator, and the reſiduary clauſe may have been dictated by unneceſſary caution. Though the Plaintiffs will only be entitled to the freehold on the idea that either *John* or *Thomas Whitelock* took a fee, ſince nothing has been done to bar the remainders, yet if an eſtate-tail in the freehold paſſed either to *John* or *Thomas Whitelock*, the leaſehold will have veſted abſolutely in them, and the Plaintiffs will be entitled to that part of the eſtate; unleſs indeed the nature of the tenure under the Archbiſhop of *York* may make a difference. If "male iſſue of *John Whitelock*"

(*a*) *Long* v. *Blackall* and others, 7 *Term Rep.* 100.

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be conſtrued to mean all male deſcendants of *John Whitelock*, ſo long as there ſhall be any, then the firſt and other ſons muſt take ſucceſſively as tenants in tail male, or all the ſons muſt take as joint-tenants with ſeveral inheritances in tail male.

Shepherd Serjt. for the Defendants. *John Whitelock* took only an eſtate for life. The expreſs words of the will give to *John Heddon* an eſtate in fee; and when the teſtator uſes the ſame words of deſcription in the proviſional deviſe to the ſon of *John Whitelock*, which he employed in the deviſe to *John Heddon*, he only meant to denote the premiſes, and not the quantity of the eſtate. If it ſhould be held that the ſon of *John Whitelock* was intended to take a fee, then the reſiduary clauſe muſt be rejected altogether as having nothing to operate upon. There is no caſe where the word "eſtate" or "eſtates" has been held to give a fee, unleſs accompanied by other expreſſions demonſtrative of ſuch an intention. In *Denn* d. *Moore* v. *Mellor*, 5 *T. R.* 563. it was held that the word "hereditaments" would not give a fee, and an expreſſion of Mr. J. *Buller*, which was thought to convey a contrary opinion, was there commented upon. But it has been contended that the ſons of *John Whitelock* by force of the words "male iſſue" were to take an eſtate-tail. Thoſe words are only ſynonimous to "ſon or ſons" before uſed, and though ſuch a conſtruction will give a better eſtate to the children of the daughter than to thoſe of the ſon, yet that appears to have been the teſtator's intention; 1ſt, From the circumſtance of his having given to *John Heddon* the rents and profits at all events, till he attained the age of twenty-one; and 2dly, From his having made him reſiduary deviſee.

EYRE Ch. J. I apprehend that upon the queſtion ſubmitted to us we ſhall have no difficulty in ſaying that *John Whitelock* the firſt ſon took no eſtate at all. I cannot read the will in the way which has been ſuggeſted by my Brother *Le Blanc*, in order to give him a veſted intereſt, before *John Heddon* attained the age of twenty-one: becauſe I ſee nothing in the will which affords any ſufficient ground for ſuch a conſtruction. Indeed that which is to be collected from the words of the will, warrants a contrary inference, the teſtator having declared that *John Heddon* ſhould have the rents and profits until he ſhould attain the age of twenty-one. With regard to the eſtate which *Thomas Whitelock* took, if it had been aſked of the teſtator when he was making the diſpoſition in queſtion, what intereſt he meant that ſuch a ſon being in *ventre ſa mere* at the time of *John Heddon* attaining the age of twenty-one, ſhould have, I think it very probable that he would have ſaid, that ſuch a ſon ſhould take an eſtate in fee; and probably he would not have thought of the limitation over. This queſtion however has not been aſked of the teſtator, and it is but conjecture what anſwer he would have made if it had been aſked; we therefore muſt conſider what he has ſaid, and muſt put a reaſonable conſtruction on his words, with reference, where they are capable of different conſtructions, to the reſt of the will. He has ſaid clearly, that he meant to give an eſtate in fee-ſimple to his grandſon *John Heddon*; but that if his ſon *John Whitelock* ſhould have a ſon or ſons, then he meant to give a benefit to ſuch of them as ſhould be living at the time when *John Heddon* ſhould attain the age of twenty-one. It is moſt evident that he meant all the ſons of *John Whitelock* who ſhould be living at the time when *John Heddon* ſhould come of age, to have a benefit of ſome kind or other: And the words "ſuch male iſſue" muſt be conſtrued to be ſo far ſynonimous to ſon or ſons, as that in ſome manner they ſhould all partake of this benefit. Now there are but two ways in which this can be effected, either by their taking as joint-tenants, or in ſucceſſion in tail male. In the ſtrict acceptation of the words "*ſuch* male iſſue," taken with reference to the words "ſon or ſons" before uſed, they mean no more than ſon or ſons; but when I conſider that theſe ſons were the ſons of his own ſon, who it appears were to have the benefit of his bounty in preference to the ſon of his daughter, and that this word "iſſue" is a collective term, capable of being deſcriptive either of perſon or intereſt, or both, I think it reaſonable to underſtand the word "iſſue" in its largeſt ſenſe, ſo as to deem it deſcriptive of an eſtate in tail male to the ſons of *John Whitelock*, as many as there ſhould be in order of ſucceſſion. This is what the words will bear. As to the argument, that a fee is conveyed to the ſons of *John Whitelock* by the word "eſtates," I take the rule to be, that it may convey a fee if the Court ſees, on the whole context of the will, that the teſtator intended that it ſhould do ſo; but that, in its ſtrict technical ſenſe, it does not convey a fee. I apprehend therefore that we ſhall certify, that *Thomas Whitelock* took an eſtate-tail in the freehold.

BULLER J. The firſt queſtion here will be on the ſenſe of the word "eſtate" as uſed in this will. There are many caſes in which this word has received different interpretations. *Noſcitur a ſociis.* Look to the words which accompany and are connected with it.

What

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What I ſaid in a former caſe with reſpect to the word "hereditaments" has been miſ-ſtated. I never ſaid that it would in all caſes carry a fee; but that, accompanied with other words, it might carry a fee. Lord *Kenyon* thought it never could, and that was the only point in which we differed. Now if the word "eſtate" will not paſs a fee in this caſe, the whole diſpute with reſpect to the freehold is at an end; for whether *Thomas Whitelock* took an eſtate-tail, or for life, will make no difference; though I concur in opinion with my Lord, that the words uſed will give an eſtate in tail male.

Heath J. I am of the ſame opinion. The word "eſtate" muſt be taken according to the context. There is a caſe in *Eq. Caſ. Abr.* (*a*) where a man having deviſed the reſidue of his goods, leaſes, mortgages, eſtates, debts, ready money, and other goods whereof he was poſſeſſed, the word "eſtates" was confined to perſonal eſtate, being coupled with chattels. It may give an eſtate for life, in tail, or in fee, according as the intention of the teſtator appears. Here I think it carried a fee-tail, from the manifeſt intent of the teſtator to prefer the line of the ſon to that of the daughter.

Rooke J. I am of the ſame opinion. The word "eſtate" or "eſtates" may or may not give a fee-ſimple, according to the context. There is no expreſſion in this will to ſhew, that it was the teſtator's intention to deſcribe, by the word "eſtates," the quantity of intereſt which was to paſs, but only the premiſes; and I think it does appear that he meant to give an eſtate-tail, it having been his manifeſt intention to give an inheritance to the ſon of his ſon, in preference to the grandſon by his daughter.

In *Trinity* Term, the following certificate was ſent to the Lord Chancellor.

We are of opinion, that *John Whitelock*, the firſt ſon of the Plaintiff *John Whitelock*, was not entitled to any eſtate under the will of *Thomas Whitelock* his grandfather: and that *Thomas Whitelock*, the ſecond ſon, took an eſtate in tail male in the eſtates which the teſtator held in fee-ſimple: and that, in reſpect to the leaſehold eſtates for lives, he and his heirs male took as ſpecial occupants during the lives of the *ceſtui que vies*.

12th *June* 1798.

Ja^s Eyre.
F. Buller.
J. Heath.
G. Rooke.

(*a*) 1 vol. p. 178. *Wilkinſon* v. *Merryland*, *Cro. Car.* 447.

ABLETT and others *v.* ELLIS.

May 14th.

It is not neceſſary to give bail in error on a judgment in debt, unleſs it appears that the action was brought on a ſpecific contract.

THE Plaintiff having declared in debt for a ſum certain, for work and labour done, goods ſold and delivered, money had and received, and on an account ſtated, "which the Defendant had agreed to pay;" the Defendant let judgment go by default, and ſued out a writ of error, but did not put in bail in error. The Plaintiff then proceeded againſt the bail to the action; and *Shepherd* Serjt. having obtained a rule to ſhew cauſe why the proceedings againſt them ſhould not be ſtayed pending the writ of error,

Le Blanc Serjt. ſhewed cauſe, and contended, that as the declaration ſtated an agreement to pay a ſum certain, the Defendant, by letting judgment go by default, had admitted that agreement, and was therefore bound to put in bail in error by 3 *Jac.* 1. *c.* 8.

Shepherd contrà cited *Girling* v. *Baker*, *Yelv.* 227; *Bidleſon* v. *Whytel*, 3 *Burr.* 1545; and *Trinder* v. *Watſon*, 3 *Burr.* 1566; and inſiſted that the form of action was not ſufficient to bring a caſe within the ſtatute, which ought to be conſtrued ſtrictly.

EYRE Ch. J. The effect of obliging this Defendant to give bail in error will be to convert all thoſe actions which for a century paſt have been actions of *aſſumpſit*, into actions of debt; and the ſame miſchief will again ariſe which firſt occaſioned their being turned into *aſſumpſit*. To bring a caſe within the ſtatute of *James*, the Court muſt ſee diſtinctly that a ſpecific contract has been entered into; and though I think that the ſtatute ſhould be conſtrued liberally, yet it does not appear to me that, on a fair conſtruction, this form of declaring can be conſidered within the meaning of it.

BULLER J. The caſes ſeem to have gone on a wrong principle, where it has been ſaid that the Court ought to conſtrue the act ſtrictly. If that be the true conſtruction, it ought to appear that the contract is for a ſpecific ſum payable at a certain time. But I ſhould have thought it better for the Court to ſay, that this act, which is a remedial law, ſhould be conſtrued liberally to prevent the miſchief recited in the preamble: "Foraſmuch as his Highneſs's ſubjects are now more commonly withholden from their juſt debts, and often in danger to loſe the ſame, by means of writs of error, which are more commonly ſued than heretofore they have been."—However we muſt not overturn the caſes.

Heath J. We muſt adhere to the rule which has been laid down; and indeed I cannot but think that the deciſions have been conformable to the intention of the Legiſlature, as the act in queſtion paſſed ſoon after the determination of *Slade*'s caſe (*a*), where it was held that an action of *aſſumpſit* would lie in caſes like the preſent.

Rooke J. of the ſame opinion.

Rule abſolute (*b*).

(*a*) 4 *Co.* 92. b.

(*b*) Vid. *Alexander* v. *Biſs*, 7 *T. R.* 449.

May 14th.

Fox and Another *v.* Money, Widow.

The Defendant muſt take advantage of an irregularity in the writ, before appearance.

Shepherd Serjt. having obtained a rule to ſhew cauſe why the proceedings in this caſe ſhould not be ſet aſide for the following irregularity in the writ, *viz.* that it was teſted the 22d *May*, inſtead of the 22d *April*,

Cockell Serjt. ſhewed for cauſe, that the Defendant had not appeared; and therefore, not being in court, was not competent to make the objection.

Shepherd contrà inſiſted that the Defendant was bound to object in the firſt inſtance.

And *the Court* (*abſente* Eyre Ch. J.) being clearly of that opinion, made The rule abſolute.

May 15th.

Doe ex dem. Gertrude Baroneſs Dacre *v.* Mary Jane Roper Dowager Lady Dacre.

Deviſe to the teſtator's ſeven ſiſters ſhare and ſhare alike; on the death of any of them, her ſhare to go to her firſt and other ſons in tail male; and for *default of ſuch ſons*, to her daughters as tenants in common. In caſe of any of the ſeven ſiſters dying without iſſue, or ſuch iſſue dying under twenty-one, the ſurviving ſiſters to take her ſhare; and if all the ſiſters ſhould die without iſſue, or ſuch iſſue die under twenty-one, then over. Held, that the words "for default of ſuch ſons" did not make the remainder to the daughters contingent, which took effect notwithſtanding the birth of a ſon.

This ejectment was tried before *Eyre* Ch. J. at the Sittings for *Weſtminſter* after *Eaſter* Term 1797; when the Jury found a ſpecial verdict, ſetting forth (as far as is material to be ſtated) as follows:

John Trevor being ſeiſed in fee, by will dated the 5th of *April* 1743, deviſed his capital manſion-houſe called *Glynde* in *Suſſex*, with the lands, &c. &c. and all his eſtates in *Suſſex*, to his kinſman Dr. *R. Trevor* in fee. He then gave to his ſiſter Mrs. *Rice*, during her life, an annuity of 300*l.*, to be paid half-yearly out of his eſtates in *Middleſex*, *Denbigh*, and *Flint*; to *Elizabeth Forſter*, formerly his nurſe, an annuity of 50*l.* for her life charged on the ſame eſtates; to his nephew *George Rice* and his niece *Lucy Rice*, children of his ſiſter Mrs. *Rice*, a legacy of 1000*l.* each; and to his couſin *Robert Trevor*, brother of Dr. *Richard Trevor*, a like legacy of 1000*l.* charged in default of his perſonal eſtate upon his ſaid eſtates in *Middleſex*, *Denbigh*, and *Flint*. He then deviſed "all his manors meſſuages tithes lands tenements and hereditaments lying and being in the ſaid counties of *Middleſex Denbigh* "and *Flint* or elſewhere not before diſpoſed of, ſubject to the "charges before mentioned, unto and amongſt his dear ſiſters "*Grace Trevor*, *Mary Trevor*, *Ann* the wife of the Honourable "*G. Boſcawen*, *Margaret Trevor*, *Ruth Trevor*, *Gertrude Trevor*, "and *Arrabella Trevor*, during their natural lives reſpectively ſhare "and ſhare alike, and from and after the deceaſe of any of them, "then the part or ſhare of her or them ſo dying to go to the firſt "and other ſons of ſuch of them ſo dying and the heirs of his and "their bodies ſucceſſively, *and in default of ſuch ſons* then to and "amongſt the daughters of his ſaid ſiſters ſo dying as tenants in "common and not as joint-tenants and the heirs of their reſpective bodies iſſuing, but in caſe any of his ſaid ſeven ſiſters laſt-mentioned ſhould die without leaving any iſſue of her body "begotten or that ſuch iſſue ſhould die before he or ſhe ſhould "attain his or her age of twenty-one years and without iſſue, then "he gave her ſhare to and amongſt the ſurvivors or ſurvivor of "his ſaid ſeven ſiſters and their iſſue to go and deſcend in like "manner as before is mentioned as to the ſhares parts or proportions before given to them reſpectively." Then having given the overplus of his perſonal eſtate, plate, and jewels, after debts and legacies paid, to be divided amongſt his ſaid ſeven ſiſters, he proceeded thus: "And I do further will and appoint that in caſe all "my ſaid ſeven ſiſters ſhall happen to die without iſſue, or leaving "iſſue, ſuch iſſue ſhall all die before he ſhe or they ſhall attain the "age of twenty-one years and without iſſue, that then my ſaid "eſtate in *Middleſex* and *Wales* (ſubject as aforeſaid) ſhall go to "and be enjoyed by ſuch perſon or perſons who ſhall then be "entitled to my eſtate in *Suſſex* hereinbefore deviſed."

The teſtator died the 9th *September* 1743. On the 27th of *July* 1744 *Gertrude Trevor*, one of the ſeven ſiſters, married the Honourable *Charles Roper*, and had iſſue two ſons, *Trevor Charles Roper* (afterwards Baron *Dacre*) and *Henry Roper* (who died), and alſo a daughter *Gertrude* (now Baroneſs *Dacre*, and leſſor of the

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Plaintiff). The Honourable *Charles Roper* died leaving *Gertrude* a widow. *Ruth* and *Margaret*, two of the ſeven ſiſters, died without iſſue, whereby the other five ſiſters became each ſeiſed for life of one-fifth of theſe eſtates. On 2d of *March* 1773 *Trevor Charles Roper* the ſon of *Gertrude*, one of the ſeven ſiſters, married *Mary Jane Fludyer*, and previous to ſuch marriage a recovery was ſuffered of the one-fifth of which his mother was ſeiſed for life, with remainder to him in tail, and the ſame was ſettled on the iſſue of that marriage, with remainder to his wife for life, remainder to himſelf in fee; which remainder paſſed by his will to his wife the Defendant. (So that as to that one-fifth the Plaintiff laid no claim.) Afterwards by the death of *Mary Trevor*, unmarried and without iſſue, in *March* 1780, her one-fifth became divided among her four ſurviving ſiſters *Grace*, *Ann*, *Gertrude*, and *Arrabella*, each taking thereby one-fourth of her one-fifth part. In *July* 1780 *Gertrude Roper* died; whereby as well her one-fifth of the whole, of which a recovery had been ſuffered on her ſon's marriage, as her one-fourth ſhare of her ſiſter *Mary*'s one-fifth, deſcended to *Trevor Charles Roper* her ſon. Afterwards in 1789 *Arrabella Trevor* died unmarried; whereby her one-fifth part of the whole, and her one-fourth part of her ſiſter *Mary*'s one-fifth, became divided among her only ſurviving ſiſter *Grace*, Mr. *Boſcawen* the ſon of *Ann Trevor*, and *Trevor Charles Roper*, ſon of *Gertrude Trevor*, in thirds. By which means *Trevor Charles Roper* (then Lord *Dacre*) became ſeiſed in tail (beſides the one-fifth of which the recovery had been ſuffered) of one-fourth of one-fifth, being his ſhare of *Mary*'s fifth part, and of one-third of one-fourth, being his ſhare of *Arrabella*'s one-fourth part. On the 3d of *July* 1794 *Trevor Charles Roper* Baron *Dacre* died without iſſue, leaving the Defendant the Dowager Lady *Dacre* his widow, (who was without doubt entitled to one-fifth of the whole eſtate, of which the recovery was ſuffered and ſettlement made previous to her marriage with him, and to whom by will he had deviſed the premiſes in queſtion,) and the leſſor of the Plaintiff the Baroneſs *Dacre*, his only ſiſter.

The leſſor of the Plaintiff, under the words "in default of ſuch "ſons," claimed the one-fourth of one-fifth part of the whole eſtate, being the late Lord *Dacre*'s ſhare of his aunts *Mary* and *Arrabella*'s ſhares, which came to him on their deaths after the recovery ſuffered, and of which, at the time of his death, he was ſeiſed in tail.

This caſe was twice argued, once in *Trinity* Term laſt by *Williams* Serjt. for the Plaintiff, and *Shepherd* Serjt. for the Defendant, and again in this Term by *Le Blanc* Serjt. for the former, and *Cockell* Serjt. for the latter.

Arguments for the Plaintiff. It will be contended on the other ſide, that as the words "in default of ſuch ſons" introduce the limitation to the daughters, that limitation is contingent, and the contingency having happened by the birth of a ſon, all the ſubſequent remainders are deſtroyed. But thoſe words do not create a contingency, being only a continuation of the preceding limitation to the ſons, and mean the ſame as if the teſtator had ſaid "on failure of the preceding limitation." This conſtruction is warranted by the general intent of the teſtator appearing on the face of the will. The ſurvivorſhip between the ſeven ſiſters being to take place only in caſe of the death of any of them without leaving any iſſue of their bodies begotten, or the death of ſuch iſſue before *he* or *ſhe* ſhall attain the age of twenty-one and without iſſue, ſhews that the teſtator had it in contemplation, that all the iſſue of his ſeven ſiſters, both male and female, would take, independent of any contingency; and the limitation to Dr. *Trevor*, being to take place only in caſe there ſhould be no iſſue of any of the ſiſters, proves the ſame intent. Moreover the teſtator by his will has excluded his ſiſter *Rice*; but if the words in queſtion ſhould be held to make the remainders over contingent, the croſs-remainders to the ſiſters, and the reverſion to Dr. *Trevor*, would be put an end to by the birth of a ſon of any one of the ſeven ſiſters, and the excluded ſiſter would take with the others as coheireſs. Indeed the very ſituation of theſe words, placed as they are between the two limitations, ſhews that they were intended to connect them, and to give to the daughters on failure of iſſue male. The court will do in this caſe what they have uſually done, namely, conſtrue the ſubſequent words by the preceding limitation, *Tuck* v. *Frencham*, *Moore* 13. *Dyer* 171. 1 *Anderſon* 8. *Co. Litt.* 21. *a.* note 126. ed. 15. *Claxton* v. *Glazier*, cited by *Mead J. Moore* 124. and in *Cro. Eliz.* 16. by the name of *Glover* and *Clatche*'s caſe. Now the preceding limitation being to the ſons in tail general, the ſubſequent words, "in default of ſuch ſons," may be read, "in "default of the preceding limitation." Where a teſtator in creating a remainder has uſed ſhortneſs or incorrectneſs of expreſſion, the Court will not on that account conſtrue the remainder to be contingent. *Nicholas Lee*'s caſe, 1 *Leon.* 285. 3 *Leon.* 106. *Holcroft*'s caſe, *Moore* 486 and 520. *Holt* v. *Burley*, 2 *Vern.* 651. Beſides there are many caſes in which the Court has even added words with a view to effectuate the apparent intention of the teſtator. *Spalding* v. *Spalding*, *Cro. Car.* 185. *Evans* v. *Aſtley*, 3 *Burr.* 1570. *White* v. *Barber*, 5 *Burr.* 2703. *Ambl.* 701. The word "default," in law, means failure, whether there have been ſons, and ſuch ſons have died, or whether there never have been any ſons. Thus if iſſue die without leaving iſſue, they are ſaid to have died without iſſue. In a formedon the writ always ſuppoſes the donee to have died without iſſue, and it is no variance if it appear that there has been iſſue, and that iſſue has ſince failed. There is however one caſe in modern times which ſeems to militate againſt the leſſor of the Plaintiff, namely, *Keene* (*a*) ex dem *Pinnock* v. *Dickſon*, *K. B. Mich.*

(*a*) A note of that caſe to the following effect was read by Mr. Juſtice *Buller*, in his judgment. *Keene* ex dem. *Pinnock* & ux. v. *Dickſon*, *B. R. M.* 23 *Geo.* 3.

In ejectment between theſe parties, tried before Lord *Mansfield* at the *Guildhall* Sittings after *Eaſter* Term 1783, a ſpecial verdict was found, ſtating (as far as is material) as follows:

Henry Dakings being ſeiſed in fee of the premiſes in queſtion, on the 5th *Aug.* 1747, deviſed the ſame to his brother *P. D.* for life, and after his deceaſe to his niece *Grace Pinnock* for life, then to truſtees to preſerve contingent remainders, and after the deceaſe of *P. D.* and *Grace Pinnock* "in truſt, and to and for the uſe and behoof of the firſt ſon of his niece *Grace Pinnock*, lawfully to be begotten, and the heirs of the body of ſuch firſt ſon lawfully iſſuing, and for want of ſuch iſſue to the ſecond, third, fourth, fifth, and ſixth, and all and every other the ſon and ſons on the body of his ſaid niece to be begotten, and the heirs of the body of ſuch ſon and ſons lawfully iſſuing, according to the ſeniority of age and priority of birth, the elder and the heirs of his body to be always preferred and take place before the younger and the heirs of his body, and for want of ſuch iſſue male then to the uſe and behoof of all and every the daughter and daughters of his ſaid niece *Grace Pinnock* thereafter to be begotten, and for default of ſuch iſſue then to the uſe and behoof of *Richard Corbin*, and the heirs of his body lawfully to be begotten; and for default of ſuch iſſue to the uſe and behoof of the ſecond ſon of *Gawin Corbin* deceaſed, and the heirs of his body to be begotten for ever." Provided that *R. Corbin*, and the ſecond ſon of *G. Corbin*, and the heirs of their reſpective bodies, in whom the eſtates ſhould become veſted, ſhould take the teſtator's name. *Henry Dakins* the teſtator died 1ſt *October* 1748, leaving his brother *P. D.* and *Grace* the wife of one *Philip Pinnock*, his niece and heir at law. *P. D.* entered, and on 1ſt *May* 1749 died; after whoſe deceaſe *Philip Pinnock* and *Grace* his wife became ſeiſed. *Philip Pinnock* and *Grace* his wife had iſſue one ſon, *Dakins Pinnock*, who was born after the death of the teſtator and died an infant, and three daughters, namely *Elizabeth*, born in the lifetime of the teſtator, and *Mary* and *Grace*, born after the deceaſe of the teſtator. *Dakins Pinnock* the ſon, and *Elizabeth* the daughter, died without iſſue in the lifetime of *Philip* and *Grace Pinnock*; *Grace Pinnock*, the mother, died 1ſt *Auguſt* 1769, leaving *Mary* and *Grace*: *Philip Pinnock* died 1ſt *March* 1778. *Mary*, on 1ſt *June* 1774, married *James Dickſon*, and died in the lifetime of *Philip Pinnock*, her father, leaving *Mary*, the Defendant, her only daughter and heir at law. *Grace Pinnock*, the only ſurviving daughter of *Philip* and *Grace*, intermarried with *George Pinnock*, the leſſor of the Plaintiff. *Grace* the leſſor of the Plaintiff and *Mary* the Defendant are co-heireſſes at law to the teſtator.

The caſe was firſt argued by *Graham* for the Plaintiff, and *Wilſon* for the Defendant, after which Lord *Mansfield* deſired that it might ſtand for a ſecond argument, and that the remainder-man might be heard; accordingly it was again argued by the Solicitor General for the Plaintiff, *Pigott* for the Defendant, and *Bower* for the Remainder-man. For the Plaintiff it was contended,

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Mich. 1783. The words uſed in that caſe do not indeed materially vary from thoſe now in queſtion. But it is to be obſerved, that it was the intereſt of both parties in that caſe to glance at the words "want of ſuch iſſue male," becauſe a veſted remainder would have defeated the eſtate of both. Lord *Mansfield* ſaw that the remainder-man was intereſted, and ordered that he ſhould be heard; but his caſe was never fully argued, no authorities were cited, nor was the Court reminded of any arguments from the tenor of the will. Beſides, as the reaſon for putting a ſtrict conſtruction upon the words "want of ſuch iſſue male," in that caſe, was in order to give effect to the manifeſt intention of the teſtator, the Court may conſider that caſe as an authority for conſtruing ſimilar words according to the intent of the teſtator in this caſe.

Arguments on the part of the Defendant. The remainder over to the daughters is only a contingent deviſe, in the event of there being no ſon; and the birth of a ſon rendered ſuch remainder void. It has been contended, that if this conſtruction ſhould prevail, the croſs-remainders and ultimate limitation will be defeated; but as they are made to depend on an uncertain event, no argument can be drawn from them. No caſe has been cited to ſhew, that the words "default" and "want" are ſynonimous; and the extenſiveneſs of the word "iſſue," with which they have been connected, is the reaſon why the caſes, in which either of them have been uſed, have been decided in the ſame way. If the words "in default of ſuch ſons," ſhall be held to mean, "if ſuch ſons be not born, *or*, if born, when they die," the eſtate-tail, before

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tended, that the daughters took only eſtates for life, or that if any thing more was neceſſary to ſatisfy the intention of the teſtator, they took joint eſtates for life, with remainders in tail to their children: for the Defendant it was inſiſted, that the daughters took an eſtate-tail: and for the Remainder-man, that on the birth of a ſon, the eſtate-tail veſted in him, and then the remainder over veſted alſo.

Lord Mansfield. No caſe exactly the ſame as this has ever been decided, or perhaps ever will be; but the caſe of (1) *Briddon* v. *Page*, which occurred laſt week, was very like it. In my private opinion I think that the whole was a blunder; but that conjecture is not a foundation for a judicial determination. We cannot ſupply a limitation to the iſſue of the daughters, for the words are expreſs. The eſtate is given to the ſons and the heirs of their bodies generally, and "for want of ſuch iſſue male," (which muſt mean ſons,) over. If therefore the eſtate is to go over for want of ſons, the contingency on which the daughters were to take has not happened, for there was a ſon who took, ſo no want of ſons, and the event in which the daughters were not to take has happened. I am ſatisfied with this conſtruction, becauſe it effectuates the intention of the teſtator, as the daughters will take in fee.

Willes J. On ſuch an embarraſſed will it is difficult to find out a right conſtruction. It is clear that the line of *Corbin* was not to take until after a general failure of iſſue of the *Pinnocks*. The eſtate to the daughters is a joint-tenancy. *Co. Litt.* 182. *Cook* v. *Cook*, 2 *Vern.* 545.

Judgment for the Plaintiff for one moiety, and for the Defendant for the other moiety.

(1) Vid. *poſt*, *p.* 261.

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given to the ſons, will be reſtrained to an eſtate for life; ſince, in the event of the ſons dying, the daughters would have a right to take. The Plaintiff therefore muſt inſiſt, that the words "default of ſuch ſons," mean "default of ſuch iſſue;" which will hardly be aſſented to by the Court. All that was decided, in *Tuck* v. *Frenſham*, was, that the teſtator intended to uſe the word "heirs" in the ſame ſenſe in both clauſes of the will. The ſame obſervation applies to the caſe in the margin of *Dyer*. In *Ives* v. *Legge*, 3 *T. R.* 488. in the note, where the remainder over was held to be veſted, the words were large enough to comprehend the iſſue of the children, which the word "ſons" is not. Even the word "iſſue" has been reſtrained to "children." *Doe* v. *Perryn*, 3 *T. R.* 484. The intereſt of the remainder-man in *Keene* v. *Dixon* was taken into conſideration; for Lord *Mansfield* deſired that he ſhould be heard by his counſel, and conſidered it in his opinion, though he clearly thought that the words "for want of ſuch iſſue male" created a contingency. Mr. J. *Buller*, alluding to that caſe in *Doe* v. *Perryn*, 3 *T. R.* 495. ſeems to have thought that the principal point decided.

Eyre Ch. J. I think that we do not want the authority of caſes at this time of day to eſtabliſh the rule of law on which we are to proceed to be this: that, in the conſtruction of a will, whether the words uſed be technical or not technical, or even of vulgar and common parlance, the Court is to put that ſenſe upon them, in which, on a fair conſideration of the whole context, they collect that the teſtator intended to uſe them. In this caſe, the words on which the difficulty ariſes are by no means technical; they may import many things, according to the ſubject-matter; and we are to inquire in what ſenſe the teſtator meant to uſe them. If we can diſcover that, the next conſideration will be, whether the words will bear that ſenſe; or whether we are tied down by any rule of law to underſtand them in any other; though indeed I can hardly put ſuch a caſe. Taking a general view of the whole will, the intent of this teſtator appears to me to be obvious. He meant to make proviſion for each of his ſeven ſiſters and their children; and he meant, that if either of his ſiſters or her children ſhould fail within a given time, that there ſhould be a ſurvivorſhip in favour of the other ſiſters and their children: and he alſo intended, that if neither of his ſiſters ſhould have children, or if the children ſhould all die under twenty-one and without iſſue, another branch of his family ſhould take. In ſome event or other, he meant, not only

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that the ſons ſhould take an eſtate-tail, but alſo that the daughters ſhould take ſuch an eſtate, failing the ſons. Then let us conſider in what ſenſe the teſtator ſuppoſed that he had uſed the words which conſtitute the limitation to the daughters. Immediately after the diſpoſition to the daughters, he ſays, " In caſe any of my ſaid ſeven ſiſters laſt mentioned ſhall die without leaving any iſſue of her body begotten, and that iſſue ſhall die before *he* or *ſhe* ſhall attain *his* or *her* age of twenty-one years, then I give her ſhare to my ſurviving ſiſters." He gives an intereſt to the ſurviving ſiſters in the event of one ſiſter dying *without either ſon or daughter*; and expreſsly ſays therefore, that there ſhall be no ſurvivorſhip if any of the daughters ſhould have iſſue either male or female. Did he not then ſuppoſe that he had uſed words ſufficiently ſtrong to give an eſtate-tail to the daughters in the event of the ſons dying without iſſue? Next comes the limitation to Dr. *Trevor*, which was to take place in the event of every one of the ſiſters dying without either ſons leaving iſſue, or daughters leaving iſſue, and ſuch iſſue dying under twenty-one. Did he not then underſtand, that by the original deviſe, and by the clauſe of ſurvivorſhip, he had given over every ſhare of each ſiſter, to the ſons firſt and their iſſue; and that limitation failing, to the daughters and their iſſue? Would he have confined the clauſe of ſurvivorſhip to the death of the ſons and daughters of his ſiſters, under twenty-one and without iſſue, if he only meant to give a contingent limitation to the daughters in the event of no ſon being born? Or would he have clogged the limitation to Dr. *Trevor* with the exiſtence of perſons to whom he had not given any intereſt? The next conſideration is, whether the words will bear that conſtruction which the teſtator palpably intended to give them. I do not feel diſpoſed to go all the lengths which ſome of the caſes on wills would warrant. I am for aſſiſting, to a reaſonable extent, teſtators, who are not always aſſiſted by the beſt advice, and whoſe ſtate of mind often partakes of the ſtate in which their bodies are; and whoſe adviſers, if they have a little knowledge of law, frequently make a ſtrange mixture of technical and common words. When I have got at the teſtator's meaning, I will, if poſſible, give ſuch a conſtruction to his words as may carry his meaning into execution; but if he has not expreſſed his will in ſuch words as can bear out his meaning, then the will muſt take its effect according to the conſtruction which the words will bear, and his intention will be defeated. In ſhort, I will depart from the technical ſenſe of words to effectuate the intention

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tention of teſtators as far as poſſible, without violating the rules of law. The words uſed in this caſe are, "in default of ſuch ſons." It is impoſſible to ſay, without reference to the context, what the meaning of theſe words is. I do not know a larger or looſer word than "default." Abſtracted from other words, what does it mean? In the expreſſions "judgment by default," and "a juror making default," we underſtand it differently. In its largeſt and moſt general ſenſe it ſeems to mean, failing. It has been argued, that the birth of a ſon would ſatisfy the words, and ſhew that there was no default, and conſequently defeat the remainder. Is there any reaſonable ground for ſo confining the word "default," as to make the mere birth of a ſon deſtroy the contingency contrary to the plain ſenſe of the teſtator, who clearly meant the default of ſuch a ſon as would take the benefit of his deviſe; whereas a ſon dying in the lifetime of his mother could take nothing? By the word "default" the teſtator meant to denote the failure of that ſon at ſome time or other. Without referring to the context, natural death is the circumſtance which he may firſt be ſuppoſed to have pointed at: if there ſhould be ſons, and they ſhould die, then the daughters ſhould take. But if we look to the context, it will appear that he meant failure of thoſe ſons to whom an intereſt was given by the former part of the deviſe. "Such" is a word of reference, and may be referred either to the individual perſon, taken abſtractedly from any thing connected with him; or it is powerful enough, where the intent appears, to include every circumſtance added to the deſcription of the perſon in the former part of the deviſe. The moſt obvious meaning of "ſuch ſon," in a proviſion of this nature, is, that ſon to whom, and to whoſe iſſue, he had given an eſtate in the former inſtance. Whatever the daughters were to take, they were to take when the proviſion to the ſons ſhould be ſpent. If there were no ſons there could be no iſſue: there might be ſons, and there might or might not be iſſue. A conveyancer might have thought right to add words to include every poſſible event: though *Holcroft*'s caſe ſufficiently ſhews that this was not neceſſary. But I do not intend to encumber myſelf with caſes. Deciſions upon other words ſomething like thoſe in queſtion, in other wills, where the whole context of thoſe other wills muſt be gone into, can afford very little aſſiſtance. The caſe of *Spalding* v. *Spalding*, which I mentioned in the courſe of the argument, is not in point; but the principle, that the whole context of the will muſt be looked into to effectuate the intent of the teſtator, is applicable to this caſe. There the queſtion was, whether a former eſtate, expreſsly given, ſhould be defeated? here it is, whether a new limitation ſhall take place? Yet if we adhere ſtrictly to the words "default of ſons," it will have the effect of giving an eſtate-tail to the daughters, in preference to the iſſue of a ſon. That indeed would be a moſt violent conſtruction, becauſe it would diſappoint an expreſs limitation; whereas here the queſtion depends on the conſtruction of the particular words creating the limitation; but as applied to the apparent intent of the teſtator, it is equally violent and improper. I think therefore that we are bound by every rule to ſay, that this teſtator meant to uſe the words "in default of ſuch ſons," in the ſenſe of "failing the limitation to the ſons;" and that the daughters did take; which diſpoſes of this queſtion.

Buller J. The difference which prevails between me and the reſt of the Court lies in a very narrow compaſs. I agree that a teſtator may expreſs his intention by what words he pleaſes, and the Court is ſo to expound his expreſſions that every word may ſtand if poſſible. The Court is to pronounce according to the apparent intent of the teſtator, but that intent muſt be found in the words of the will, and is not to be collected by conjecture *dehors* the will, or as my Lord Chief Juſtice expreſſed himſelf in a late caſe, as the queſtion has not been aſked of the teſtator, it is but conjecture what would have been his anſwer. I hold that if there are repugnant or inconſiſtent clauſes, the Court muſt take the whole will and find the meaning as far as they can; but if the words are ſenſible, and there are none uſed but what *may* ſtand, then they *muſt* all ſo ſtand, and the will muſt be conſtrued according to the plain meaning of thoſe words, without any ingenious conjecture whether the teſtator meant more or not. In this caſe it has not been argued that any part of the will is inconſiſtent, or that every word may not ſtand. It has been contended that the words "in default of ſuch ſons" mean, either, if there are no ſons; or if there are ſons and thoſe ſons die, and that the words are capable of either of thoſe interpretations. But I think that the teſtator could not mean that where the ſons died the eſtate ſhould go over, becauſe I find on the face of the will that if there was a ſon, that ſon ſhould take an eſtate in tail general, and conſequently his iſſue ſhould take after him. The words however may be conſtrued "if there be no ſons;" and where there are two conſtructions, one of which is ſenſible and

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the other not, you muſt take that which is ſenſible and reject the other. Thus ſtands the firſt argument. Then it was argued that on the authority of caſes we muſt make the words bend to the intent. But all the caſes which have been cited depend on the ground of the wills being repugnant or inaccurate. Thus in *Tuck* v. *Frenſham*, the firſt limitation to *heirs male*, and the ſubſequent remainder over in caſe the deviſee ſhould die without *heirs* generally, being inconſiſtent, it was neceſſary for the Court to take the whole together, in order to diſcover the real meaning of the deviſor, and then to put a ſuitable conſtruction on his words. So in the caſe of *White* v. *Barber*, the will was very inaccurate, and the Court were obliged to take a liberty with it in order to make ſenſe. In *Spalding* v. *Spalding*, the deviſe over was inconſiſtent with the preceding limitation. With reſpect to the caſe of *Evans* v. *Aſtley*, the proviſo that the deviſees and their "deſcendants" ſhould take the name and arms of the deviſor, was inconſiſtent with a mere eſtate for life. My diſtinction is, that in incorrect wills the Court may take liberties, but that if the words are correct they have no power to make any alteration. In this caſe, as the teſtator has ſpoken plainly, it is no matter what he would have ſaid if he had been aſked. Indeed if he had been told what would become of his eſtate, he might have given different anſwers. He would not have acted unreaſonably if he had ſaid, that without any wiſh to continue the eſtate in his family for ever, he ſhould be ſatisfied if in caſe either of his ſiſters ſhould have a ſon, the eſtate were ſecured to him. Beſides we muſt recollect that in great families when a ſon is born, very little regard is paid to the daughters. Or he might have ſaid, "if there ſhould be a ſon, he will have the power of cutting off the entail, and I will not trouble myſelf to make any further diſpoſition." But whatever anſwer he might have given, the Court cannot alter the words of the will, and can only ſay *quod voluit non dixit.* Beſides, if there can be a doubt, we muſt recollect that by the conſtruction contended for we ſhall diſinherit the heir at law, a circumſtance which it is not uſual to lay out of the conſideration of the Court. The caſe of *Hay* v. *Coventry*, 3 *T. R.* 83. may be cited to ſhew that where the words of a will are ſuch that the Court cannot help believing in their own private opinion, that it was the intention of the teſtator to give a fee, yet if the words uſed are not ſufficient for that purpoſe, the Court cannot make any alteration. There are two other caſes, however, which more immediately apply to the point in diſpute.

pute. (Here Mr. Juſtice *Buller* referred to his own notes of the caſes of *Denn* ex dem. *Briddon* and Wife v. *Page* and another (*a*), and *Keene* ex dem. *Pinnock* and Wife v. *Dickſon*.) In both thoſe caſes the Court was of opinion that the word "ſuch" could only refer to that iſſue which had been before mentioned, *viz.* to the ſons. Looking at theſe caſes, then, I do not feel myſelf at liberty to reject any word of the will before us. The clauſes are ſenſible throughout, and the plain conſtruction of the limitation "in default of ſuch ſons" is, that the daughters ſhall take in caſe there be no ſons.

Heath J. It ſeems admitted both by the Bar and the Bench that the clear intention of a teſtator will control the literal con-

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(*a*) *Denn* ex dem. *Briddon* and Wife v. *Page* and another, *B. R. M.* 23 *G.* 3.

In ejectment tried at *Derby*, 1783, the jury found a verdict for the leſſors of the Plaintiff, ſubject to the opinion of the Court, on a caſe which (as far as is material) ſtated, that the teſtatrix deviſed lands to *S. Naſh*, ſon of *T.* and *M. Naſh*, for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *S. Naſh*, and the heirs male of his and their bodies; "for default of ſuch iſſue, to the uſe and "behoof of all and every the daughter and "daughters of the body of the ſaid *T. Naſh*, "on the body of the ſaid *M.* his wife begotten and to be begotten, and for default of *ſuch* iſſue to the uſe and behoof "of the right heirs of the ſaid *T. Naſh* for "ever;" that *S. Naſh* died leaving a daughter, *Mary*, one of the leſſors of the Plaintiff; that *Jane*, a daughter of *T. Naſh*, on the death of her brother *S. Naſh*, entered into poſſeſſion of the premiſes in queſtion, ſuffered a common recovery, and conveyed to the Defendants.

The queſtion for the Court was, whether *Jane* took an eſtate for life or an eſtate-tail?

Balguy for the leſſors of the Plaintiff contended, that the words "default of ſuch iſſue" could not be held to carry an eſtate in tail male, and if they were conſtrued to convey an eſtate in tail general, a greater eſtate would by that conſtruction be given to the daughters, than had before been given to the ſons.

Hill Serjt. *contrà* inſiſted that the words "for default of ſuch iſſue," after the limitation to the ſons, could not be confined to the mere failure of ſons, but extended to the failure of ſons of thoſe ſons. *Wyld* v. *Lewis*, 1 *Atk.* 432. *Evans* ex d. *Brooke* v. *Aſtley*, 3 *Burr.* 1570.

Lord **Mansfield** Ch. J. This queſtion does not admit of much argument, nor of caſes to be cited, for every caſe muſt depend upon its own circumſtances. The rule of law is clear, that a grant by words of purchaſe without further limitation enures for life only. When wills came to be in vogue, it pleaſed the Judges to conſider them in their conſtruction with analogy to the rule of law reſpecting deeds, and not with analogy to the *Roman* appointment, and therefore they held that ſuch a grant enured for life only. There is hardly an inſtance where the words of a deviſe are reſtrained to a life-eſtate only, in which the intention of the teſtator is not contravened, for common men are ignorant of the difference between land and money. This being ſo, the Courts have been aſtute to find out, if poſſible, from other parts of the will the intention of the teſtator. The queſtion then is, whether there be enough here on the face of the will? for we muſt not go into conjecture. I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or ſpecial. Is there then any authority for ſupplying the defect, and making the will anew? Had the words been "if they die without iſſue," an eſtate-tail would have been implied; but here the words are "for default of *ſuch* iſſue," *viz.* that iſſue which is before mentioned. The Court has no power to ſtrike out the word "ſuch," and if they did, what are they to ſupply it with? are they to give an eſtate in tail general, or in tail male? There is no intention therefore apparent on the will to direct the Court.

Buller J. of the ſame opinion.

Judgment for the Plaintiffs.

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ſtruction of his words. It muſt be admitted that the words here expreſs a condition on which the limitation over to the daughters of the ſiſter ſhall take place: but it is eaſy to conjecture by what ſlip theſe words were uſed: and the queſtion is, whether ſuch a ſlip ſhall defeat the apparent intention? It has been held in caſes of remote antiquity, that a limitation which in form appears to be conditional ſhall be conſtrued to be abſolute if moſt ſuitable to the intention of the teſtator. The words in *Holcroft*'s caſe are very ſtrong, and yet it was reſolved that the deviſe ſhould take effect as a limitation. So in *Andrews* v. *Fuller*, *Str.* 1092. which was decided in later times, the Court obſerved that it was no unuſual thing for words of condition to be taken as words of limitation where there is a remainder over. And it was laid down as a principle in *Ives* v. *Legge*, 3 *Term Rep.* 489. that the Courts will not conſtrue a remainder to be contingent, where it can be taken to be veſted. In *Keene* ex dem. *Pinnock* v. *Dickſon*, no intention of the teſtator could be collected, and therefore the words were conſtrued according to their literal meaning. Now the queſtion here is, whether the intention of the teſtator cannot be collected to be that *from and after* the death of ſuch ſons the daughters ſhould take? This intention is ſtrongly ſhewn by the different deviſes in the will, and the limitation over to the *Trevor* family. If the conſtruction contended for by the Defendant ſhould take effect, the conſequence would be that the heir at law would be admitted, and the limitation over entirely defeated, and that which was the clear intention of the teſtator would not take place. For theſe reaſons I am with the leſſor of the Plaintiff.

Rooke J. On looking at this will I cannot but think that the teſtator meant, that in caſe the ſons and the iſſue of ſuch ſons ſhould fail, the daughters ſhould take; and that he could not intend that on the birth of a ſon all the ſubſequent limitations ſhould be defeated. The words "default of ſuch ſons" may either mean if there be no ſons, or if there be ſons and thoſe ſons ſhall die. By a former part of the will an eſtate-tail is given to the ſons. Now a ſubſequent proviſion is not to be conſtrued to revoke a former proviſion, but muſt, if poſſible, receive ſuch a conſtruction as is conſiſtent with it. I cannot ſay that the words, ſtrictly taken, mean if there ſhall be no ſon: the expreſſion "default of ſuch ſons" is as vague as default of ſuch iſſue, which imports on the general failure of iſſue; ſo here theſe words cannot be taken merely to mean if no ſons ſhall be born, Doe ex dem. Dacre v. Dacre.

but when ſons ſhall fail; and this conſtruction is conſiſtent with the preceding limitation, and in this way all the proviſions of the will may ſtand. But if there be any doubt on this conſtruction, we are ſtill warranted by the caſe of *Spalding* v. *Spalding* to inſert the words "heirs of their bodies;" and though the Court might not think themſelves warranted in *Keene* v. *Dickſon* to alter the words, yet that caſe does not much move me, as the words were not the ſame as they are here: indeed I have long been tired of looking into caſes on wills. I think, however, that it is not neceſſary to ſupply any words, as the expreſſion "default of ſuch ſons" may either apply to having ſons and thoſe ſons dying, or to not having ſons at all; and therefore the Court is bound to give that conſtruction which is conſiſtent with the other clauſes of the will.

Judgment for the Plaintiff.

Webb, one, &c. *v.* Pritchett.

May 15th.

In an action on an attorney's bill, the *Niſi Prius* Roll is good *primâ facie* evidence that the action was not commenced till the expiration of a month after delivery of the bill.

This was an action by an attorney to recover the amount of a bill delivered for buſineſs done in his profeſſion, and was tried before *Lawrence* J. at the laſt Spring aſſizes for *Worceſter*.

At the trial it was inſiſted that the Plaintiff could not recover without producing the writ, in order to ſhew that a month had expired after the delivery of his bill before the action was commenced, as he had no right of action till the expiration of that month. The writ not being produced, the learned Judge nonſuited the Plaintiff, giving him leave to apply to the Court to ſet the nonſuit aſide, and enter a verdict for the amount of his demand 12*l.* 8*s.*, if they ſhould think the nonſuit wrong.

Accordingly *Williams* Serjt. on a former day having obtained a rule *niſi* for that purpoſe,

Marſhall Serjt. now ſhewed cauſe, and contended that the 2 *Geo.* 2. *c.* 23. *ſ.* 23. having enacted that an attorney ſhall not declare till a month after the delivery of his bill, it becomes neceſſary in this, as in other caſes where the action is not to be brought before or after a certain day, to ſhew its actual commencement; he added that a *King's Bench* record, in which the day is ſtated in the memorandum, may be taken as good *primâ facie* evidence at *Niſi Prius* of the time at which the action was commenced; but that as a record in this court only begins with the

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placita of the term, there is nothing from which the day on which the action was commenced can be inferred.

Eyre Ch. J. (ſtopping *Williams* Serjt.) The only queſtion here is, whether the *Niſi Prius* Roll is ſuch *primâ facie* evidence as will if uncontradicted ſatisfy the 2 *Geo.* 2. *c.* 23.? That act declares that no action ſhall be brought by an attorney upon his bill, till that bill has been delivered a month. At the trial the Plaintiff proves that his bill was delivered on a certain day, and then produces the record to ſhew that the action was commenced after the month had expired. We all know that the record is made up of the term in which iſſue is joined. That which is *primâ facie* evidence of the action being properly commenced may be contradicted by the Defendant, whoſe buſineſs it will be to ſhew by a copy of the writ, that it was really commenced before the time. Were it not therefore for the very reſpectable authority by whom this nonſuit was directed, I ſhould think this a very ſimple caſe. The record ſhews the commencement of the action, and ſometimes indeed to the Plaintiff's peril, if he has not had the precaution to enter a ſpecial memorandum (*a*); as where the record is of the term generally, it relates back to the firſt day of the term (*b*). If then the record in ſome inſtances operates againſt the Plaintiff, why ſhall it not alſo operate in his favour?

Buller J. of the ſame opinion.

Heath J. of the ſame opinion.

Rooke J. of the ſame opinion.

Rule abſolute.

(*a*) *Dodſworth* v. *Bowen*, 5 *T. R.* 325. (*b*) *Pugh* v. *Robinſon*, 1 *T. R.* 116.

May 18th.

Ribbans *v.* Crickett and another.

It being contrary to 7 & 8 *W.* 3. *c.* 4. for a candidate to furniſh proviſions to *any* voters after the teſte of the writ, an inn-keeper cannot recover againſt a candidate for proviſions ſo furniſhed at his requeſt. Payment of money into court is an admiſſion of a legal demand only.

The Plaintiff in this caſe was an inn-keeper, and the Defendants two of the candidates at the laſt election of repreſentatives in Parliament for the borough of *Ipſwich*. The action was brought on a bill for proviſions furniſhed to the voters of the borough, at the requeſt of the Defendants, conſiſting of three deſcriptions of charges; *viz.* 1ſt, For proviſions furniſhed before the *teſte* of the writ; 2dly, For proviſions furniſhed after the teſte of the writ to voters reſident in the borough; 3dly, For proviſions furniſhed to voters not reſident in the borough. The Defendants paid into court ſufficient to cover the charges of the firſt and laſt deſcriptions. At the trial before *Aſhburſt* J. at the laſt *Bury* Spring aſſizes, the Defendants conteſted the amount of the bill, and endeavoured to prove that the Plaintiff had charged for proviſions furniſhed to perſons not voters, but having failed to eſtabliſh that defence, a verdict was found for the Plaintiff.

A rule having been obtained to ſhew cauſe why this verdict ſhould not be ſet aſide and a new trial be had on the ground of a part of the cauſe of action being contrary to 7 *W.* 3. *c.* 4.

Le Blanc and *Heywood* Serjt. ſhewed cauſe and argued, firſt, that as it did not appear that the proviſions were furniſhed to the voters "in order" that the Defendants might be elected, the caſe was not within the ſtatute, for that thoſe words though uſed at the end of the ſecond diviſion of the clauſe muſt be conſtrued to run through the whole(*a*). Next if it did come within the ſtatute, that bribery was only *malum prohibitum*, and however criminal in the candidate, would not vitiate a contract entered into with another perſon; and reſembled the caſe of money lent to play with, which may be recovered by action, though the play be contrary to an expreſs ſtatute. *Barjeau* v. *Walmeſley*, 2 *Str.* 1249. *Robinſon* v. *Bland*, 2 *Burr.* 1080. Laſtly, that part of the proviſions were furniſhed to voters reſident at a diſtance from the borough, (which had never been conſidered in the deciſions of the committees of the Houſe of Commons to be within the meaning of the ſtatute,) and the verdict being good as to that part of the demand, therefore the Plaintiff might apply the money paid into court to any other part which he might think proper.

Shepherd Serjt. for the Defendants inſiſted that the words "in order," &c. uſed in 7 & 8 *W.* 3. related only to the latter part of the clauſe (to which the Court agreed). He next argued that no perſon employed to carry into effect *malum prohibitum* was entitled to recover; and inſtanced the caſes of perſons ſelling goods for the purpoſe of being ſmuggled, and of inſurances upon illegal voyages. He cited *Faikney* v. *Reynous*, *Burr.* 2069. *Petrie* v. *Hannay*, 3 *Term Rep.* 418. *Steers* v. *Laſhley*, 6 *Term Rep.* 61.

(*a*) No perſon, &c. after the teſte of the writ, &c. ſhall before his election, directly or indirectly, give, preſent, or allow to any perſon or perſons having voice or vote in ſuch election, any money, meat, drink, entertainment, or proviſion, or make any preſent, gift, reward, or entertainment, or ſhall at any time hereafter make any promiſe, agreement, obligation, or engagement, to give or allow any money, meat, drink, proviſion, preſent, reward, or entertainment, to or for any ſuch perſon or perſons in particular, or to any ſuch county, city, &c. or to or for the uſe, &c. of any ſuch perſon, place, &c. *in order* to be elected, or for being elected to ſerve in parliament for ſuch county, city, &c.

Booth v. *Hodſon*, 6 *Term Rep.* 405. and *Mitchell* v. *Cockburne*, 2 *H. Bl.* 579. and inferred from thoſe caſes that as the demand aroſe out of an illegal tranſaction it could not be ſupported. As to the money paid into court, he ſaid that the Plaintiff could not be allowed to retain it for the illegal demand, and recover for the legal one.

Eyre Ch. J. It ſeems to be the opinion of the whole Court that if the Defendants think proper to inſiſt on their objection, they muſt do it with ſucceſs. This action is apparently founded on a contract to diſobey the law, being to provide entertainment for voters during an election. The defence ſet up proves the principle of the contract, for the point conteſted at the trial was, whether or not the Plaintiff had abuſed the confidence repoſed in him, by ſquandering the proviſions among perſons who were not voters? Then how ſhall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very ſerious nature in the opinion of the Legiſlature, as appears by the preamble of 7 & 8 *W.* 3. *c.* 4.; how then can we enforce a contract to do that very thing which is ſo much reprobated by the act? I am perfectly aware that great difficulties may ariſe from conſtruing this act rigidly, but perhaps ſtill greater will ariſe if it be not ſo conſtrued. It is true that a voter who comes from a diſtance may have reaſon to complain if he is not provided with neceſſaries; but it is alſo obvious that if the candidate can ſupply him, he may ſupply himſelf. If any exception is to be allowed for voters not reſident, the whole miſchief complained of in the act will neceſſarily follow. It will be impoſſible for the candidate to make a diſtinction between thoſe voters who reſide at a diſtance, and thoſe who live within half a mile of the place of voting. The Legiſlature has drawn a ſtrict line which is not to be departed from: it ſays, that after the teſte of the writ no meat or drink ſhall be given to the voters by the candidate; and that being the caſe, this Court cannot give any aſſiſtance to the Plaintiff conſiſtently with the principles which have governed the courts of juſtice at all times, and with the caſes which have been cited this day. Perſons who engage in this kind of tranſactions muſt not bring their caſe before a Court of Law. With regard to the money paid into court, it is to be obſerved, that ſuch payment is only an admiſſion of a legal demand, and we cannot allow it to be applied to an illegal account.

Per Curiam, Rule abſolute.

Wilson *v.* Saunders.

May 18th.

If goods prohibited from being ſold in this country by 11 and 12 *W*. 3. *c*. 10. are taken out of a warehouſe, and put on board a veſſel as if for exportation, but in fact with a view to be relanded, they are liable to be ſeized, though no actual attempt to reland them has been made.

Trespass for ſeizing goods under the following circumſtances. The Plaintiff purchaſed at the *India* ſale a quantity of *Bandanno* handkerchiefs, (which are prohibited to be uſed in this country by 11 and 12 *Will*. 3. *c*. 10.) and ſent them down with the uſual forms, under the care of a Cuſtom-houſe officer, to the Cuſtom-houſe at *Alborough*, where they were put on board the *Experiment* cutter by the Cuſtom-houſe officers, the Plaintiff having entered them for *Hamburgh*, and the cutter having cleared out for that port, though ſhe had only a licence to fiſh between *Flamborough Head* and the *Iſle of Wight*, under 24 *Geo*. 3. *c*. 47. The Plaintiff had given ſecurity for the goods "being exported and not relanded" according to the directions of 11 and 12 *Will*. 3. *c*. 10. *ſ*. 2. The Defendant who was Captain of the *Argus* revenue cutter ſeized the veſſel and goods after the former had proceeded ſome way down the river, but while ſhe was within the limits of the port of *Alborough*, and a tide-waiter of that port being on board at the time.

The cauſe was tried before *Heath* J. at the Summer aſſizes for *Suffolk* 1797, when a verdict was found for the Plaintiff with liberty to the Defendant to move to ſet it aſide in the enſuing term.

Accordingly *Le Blanc* Serjt. having in *Michaelmas* term obtained a rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had, becauſe the *Experiment* cutter, having been found acting in a manner not warranted by her licence, was to be conſidered as having no licence;

Shepherd Serjt. in the following term was proceeding to ſhew cauſe on the above ground, when the Court ſaid, that if the goods were *bonâ fide* delivered for exportation, the Plaintiff's caſe was clear; but that if there was no *bonâ fide* intention to export them, it might be a queſtion whether they were not ſeizable under 11 and 12 *Will*. 3. *c*. 10. *ſ*. 2. in the ſame manner as if they had been found expoſed in a ſhop for ſale: and directed him to ſpeak to that point.

Shepherd. Suppoſing it were manifeſt that theſe goods were meant to be relanded, yet I ſubmit that neither could they be ſeized, nor would the Plaintiff's ſecurity be forfeited, until ſome

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attempt had been actually made to accompliſh that purpoſe. If the goods had been carried out to ſea with the avowed intention of being relanded, and the veſſel on board which they were put had been loſt in a ſtorm before any attempt towards relanding had been made, clearly the ſecurity would not have been forfeited, which ſhews that the forfeiture does not attach on the intention. Beſides, the mere putting goods on board a veſſel which has a licence to fiſh between certain points only, does not of itſelf raiſe a preſumption that the goods are to be carried to any place beyond thoſe points; for the veſſel in contravention of her licence may go to *Hamburgh* or any other port, though ſhe can never return to this country without being ſubject to forfeiture.

Eyre Ch. J. See how this caſe would ſtand if it were put in pleading. The officer's *primâ facie* defence would be, "I ſeized theſe "goods becauſe I found them on board ſuch and ſuch a veſſel, and "not in a warehouſe approved by the commiſſioners of the cuſtoms, "according to 11 and 12 *Will.* 3. *c.* 10. *ſ.* 2." To this the Plaintiff would anſwer, "True it is, that the goods were not in ſuch a "warehouſe, yet I am by law allowed to export them; and I have a "right to take them out of the warehouſe for exportation, provided "I give a bond to export and not reland them;" *and would aver that he took them out of the warehouſe for exportation*, and that he gave a bond, &c. The Defendant might deny that the goods were taken out of the warehouſe in order to be exported, and on this an iſſue would be joined. The queſtion for the jury would then be, whether, when a perſon goes through the neceſſary ceremonies which belong to a fair exportation, and puts his goods on board a veſſel colourably bound for *Hamburgh*, but in fact a cutter licenſed to fiſh between *Flamborough Head* and the *Iſle of Wight*, together with all the circumſtances which belong to this caſe, tending to prove that they were not meant to be exported, he can be conſidered as having taken them out of the warehouſe in order to export them? My opinion is, that if it could be demonſtrated that he had no intention to export them, and that he meant to put them on board a veſſel, in order to be carried one, two, or three leagues only from the ſhore, proof of that intention would defeat the allegation that they were taken out of the warehouſe for the purpoſe of exportation. The circumſtance of actual relanding need not be ſhewn, for the caſe would be vitiated by the original intention with which the goods were taken out of the warehouſe. I think that the circumſtances of the caſe afford a preſumption on this one point, which ought to be ſubmitted to a jury. There may have been reaſons of neceſſity ſufficient to juſtify the Plaintiff in having acted in the manner which he has done; and he will have an opportunity of inſiſting upon them at a new trial. I am anxious that the principle of theſe laws ſhould be a little underſtood, and that an idea ſhould not be entertained, that if all the forms and ceremonies preſcribed by the act are complied with, the ſubſtance may be evaded with impunity.

Per Curiam, Rule abſolute.

At the Spring aſſizes following the cauſe again came on to be tried before *Aſhburſt* J.—and it being left to the jury to determine whether the goods were put on board the cutter with the intention of being exported, a verdict was found for the Defendant.

In conſequence of which *Shepherd* Serjt. in this term obtained a rule *niſi* for a new trial on two grounds: 1ſt, That the goods at the time of the ſeizure were in *cuſtodiâ legis*, having been ſent down to *Alborough*, under the care of a Cuſtom-houſe officer, having been put on board the veſſel at *Alborough* by Cuſtom-houſe officers, and an officer having been on board at the time when they were ſeized: 2dly, That the goods were in a courſe of exportation, no act towards relanding them having been done.

But *the Court*, after hearing *Shepherd* on this day, were clearly of opinion, That the goods were not in the cuſtody of the law, for that the owner after giving ſecurity in *London* according to the ſtatute was at liberty to export them as he thought fit; that the practice of ſending down an officer with the goods was not required by the 11 and 12 *W.* 3. but had been adopted from 6 *G.* 3. *c.* 40. *ſ.* 6. which relates to the exportation of *Eaſt India* goods to *Africa*; and that the officer who was on board at the time of the ſeizure was placed there for the general protection of the revenue, not to watch theſe particular goods. As to the ſecond point, that there was no diſtinction between an intention to export the goods, and their being in a courſe of exportation: and that if it could be demonſtrated that all intention to export them was abandoned, the bond of ſecurity might be put in ſuit, though all the forms neceſſary to exportation had been complied with.

Rule diſcharged.

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EDMONSON *v.* POPKIN.

The Court ſet aſide a warrant of attorney, and judgment given to ſecure a loan, which was ſworn to be uſurious, in order to bring the queſtion of uſury before a jury; but refuſed to order a bill of exchange to be delivered up, which had been given to procure the defendant's releaſe out of execution on the judgment.

HEYWOOD Serjt. moved for a rule to ſhew cauſe why a warrant of attorney given to ſecure an uſurious loan, and the judgment entered up thereon ſhould not be ſet aſide, and why a bill of exchange, given by the Defendant for the purpoſe of procuring his releaſe out of execution on the judgment, ſhould not be ordered to be delivered up: he cited *Machin* v. *Delaval*, *Barnes* 52. 3d edit. and ſaid, as to the latter part of the rule, that taking ſuch a bill of exchange was a contempt of the Court.

But *the Court* thought, that the rule ought to be confined to the warrant of attorney and judgment, as they were not to decide the queſtion of uſury in a ſummary way: and that they would not have interfered at all, but in order that the queſtion of uſury might be tried, which would be ſhut out if the judgment were allowed to ſtand.

Accordingly a rule *niſi* for ſetting aſide the warrant of attorney and judgment was granted, and afterwards

Made abſolute.

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BOWRING *v.* EDGAR.

A note for ſecuring the weekly allowance to a priſoner under the Lords' act, need not be ſtamped.

THE Plaintiff having given the Defendant, who was a priſoner in execution, a note for his weekly allowance on a ſix-penny ſtamp, *Le Blanc* Serjt. obtained a rule calling on the Plaintiff to ſhew cauſe why the Defendant ſhould not be diſcharged out of cuſtody, under the Lords' act (*a*), contending that as the laſt ſtamp act (*b*) had increaſed the ſtamp of 6 *d.* impoſed by 31 *Geo.* 3. *c.* 25. to 8 *d.*; the ſtamp on the note given by the Plaintiff muſt be conſidered as a nullity: and cited *Pittman* v. *Haines*, 7 *Term Rep.* 530. where the Court of *King's Bench* held that ſuch a note as the one in queſtion ought to be ſtamped.

Williams Serjt. in ſhewing cauſe inſiſted that no ſtamp was neceſſary; for that by 31 *Geo.* 3. *c.* 25. the duty is impoſed upon thoſe notes only where "the ſum expreſſed therein or made payable thereby ſhall amount to 40 *s.*"; whereas the ſum expreſſed in the note in queſtion was only 3 *s.* 6 *d.*: and added, that the

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(*a*) 32 *Geo.* 2. *c.* 28.

(*b*) 37 *Geo.* 3. *c.* 90.

ſum owing under this note never could amount to 40*s.* ſince it is provided by the Lords' act, that if the allowance be not paid weekly the Defendant may apply for his diſcharge, even in the time of vacation.

The Court inclined to this opinion, but ordered the matter to ſtand over that they might have an opportunity of conferring with the other Judges.

Early in the next term, *Eyre* Ch. J. ſaid that a conference had taken place between the Judges, who were of opinion that no ſtamp was neceſſary.

Per Curiam, Rule diſcharged.

Osborn *v.* Tatum.

May 19th.

A rule was diſcharged, becauſe the affidavit on which the rule *niſi* was obtained, was not entitled in any Court; the words "in the" only being prefixed.

Shepherd Serjt. having on a former day obtained a rule *niſi*, for ſetting aſide an execution on a judgment entered on a warrant of attorney,

Cockell Serjt. who was now to have ſhewn cauſe, took the following preliminary objection, *viz.* that the affidavit on which the rule *niſi* had been obtained was not intitled in any court, the words "in the" only being prefixed, without "Common Pleas."

Shepherd contrà inſiſted, that the title was not a neceſſary part of the affidavit; as it appeared from the jurat, that it was ſworn before one of the Judges of this court; and that, even if it were neceſſary, ſtill the objection came too late, as the rule had been enlarged for ten days, on the application of the other ſide.

The Court however held it to be a ſufficient objection, and diſcharged the rule; though without coſts, in conſequence of its having been enlarged.

Rule diſcharged.

Chetwind *v.* Marnell, Executor of General Brome.

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The Court will not make a rule on a Plaintiff who brings an action on a bond, to allow an officer of the ſtamp duties to inſpect the bond, becauſe the Defendant ſuſpects it to be forged.

An action having been brought on a bond of the teſtator, the Defendant craved oyer of the bond, pleaded *non eſt factum,* and now moved for a rule calling on the plaintiff to ſhew cauſe, why he ſhould not allow the bond to be inſpected in his hands by an officer of the ſtamp duties.

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CHETWIND *v.* MARNELL.

Marſhall Serjt. ſtated the ground of this application to be a ſuſpicion that the bond was forged; and contended, that there could be no objection to the Court's granting the rule, as the inſtrument would remain in the Plaintiff's hands, and he would not be compelled to produce it if indicted for forgery.

Sed per EYRE Ch. J. This caſe was before me at Chambers; but I thought it would be a violent meaſure to order the Plaintiff to produce an inſtrument which might be the means of convicting him of a capital felony. The Defendant has already pleaded *non eſt factum*, and therefore the Plaintiff will be obliged to produce the bond, if he means to ſucceed in his action. But as he may think better of it, we ought not to put his life in danger by the exerciſe of a ſummary juriſdiction.

Marſhall took nothing by his motion.

In the *Exchequer Chamber.*

May 19th.

The excluſive right of trading to the *Eaſt Indies* granted to the *Eaſt India* Company by ſtat. 9 & 10 *W.* 3 has never been put an end to, and any infringement of it is a public wrong. Though ſuch parts of that act as inflicted penalties, &c. were repealed by 33 *Geo.* 3. *c.* 52.; and though the latter act ſays, that no acts or parts of acts thereby repealed ſhall be pleaded or ſet up in bar of any action, &c. it is competent to underwriters who have ſubſcribed policies on ſhips trading to the *Eaſt Indies*, in contravention of 9 & 10 *W.* 3. to avail themſelves of the illegality of ſuch trading, in an action brought on the policies.

CAMDEN and others *v.* ANDERSON, in Error.

A WRIT of error having been brought in this court, on the judgment given in the *King's Bench* between theſe parties, the caſe was twice argued; in *Trinity* Term 1797, by *Parke* for the Plaintiff in error, and *Giles* for the Defendant; and in *Eaſter* Term 1798, by *Wood* for the former, and *Rous* for the latter: but as the grounds of argument were nearly the ſame as thoſe taken in the *King's Bench*, and moſt of them were noticed in the judgment of the Court, the account of them is here omitted.

The Court took time to conſider of their opinion, which was this day delivered by

EYRE Ch. J. who, after ſtating the ſpecial verdict, (for which, with the arguments and judgment in the *King's Bench*, ſee 6 *T. R.* 723.) proceeded thus:—The caſe of the Plaintiffs in this action is *primâ facie* plain and clear; for a conſideration in money, the Defendant *Anderſon* has aſſured the Plaintiff's ſhip the *Albemarle* againſt capture in the voyage deſcribed in the policy ſtated in the declaration. The ſhip was captured by the enemy in the courſe of that voyage, by which a loſs is incurred, which the Defendant has undertaken to make good. The defence is founded upon a principle of law, which is paramount to all obligation by which the parties to a contract can bind themſelves, and is powerful enough to control it,

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it, and to render it null and void in law. That which is unlawful in itſelf, and which is a public wrong, cannot be the ground of an action. The Defendant inſiſts, that the voyage inſured was in an illicit and a clandeſtine trade; that, as ſuch, it was unlawful, and could not be the ſubject of an aſſurance. The principle has been admitted, in the courſe of the argument, at the bar; the application of it to the particular caſe only has been controverted. The Plaintiffs in the action inſiſt, that the proviſions of the ſtatute of 33 *Geo.* 3. preclude the application of it to this caſe; admitting that which upon this ſpecial verdict it is impoſſible to deny, that this ſhip *Albemarle* was engaged in an illicit and clandeſtine trade. This act of 33 *Geo.* 3. *c.* 52. is very voluminous, having for its object the continuing in the *Eaſt India* Company the poſſeſſion of the *Britiſh* territories in *India*, together with their excluſive trade, the eſtabliſhing further regulations for the government of the ſaid territories, and ſeveral other purpoſes therein mentioned. The proviſions which reſpect the excluſive trade are to be found in the 129th and the ſubſequent ſections to the 150th ſection incluſive; two ſections only, *viz.* the 148th and 149th, which are proviſoes reſpecting other matters, being interpoſed rather inconveniently, as breaking the thread of the ſubject, and particularly the connection between the 147th and the 150th ſections, which ſhould be taken together in order to underſtand the 150th ſection upon which this queſtion turns. The 129th ſection recites, that "various "ſtatutes have been heretofore made for ſecuring to the ſaid "United Company their ſole and excluſive right of trading to the "*Eaſt Indies* and parts aforeſaid, during the continuance of ſuch "ſole and excluſive right, and to reſtrain all illicit and clandeſtine "trade to, in, and from the *Eaſt Indies* and parts aforeſaid: and "that the limitations and proviſions in the ſaid act contained, con-"cerning the future conduct of the ſaid trade, *require* that ſome "*alterations* ſhould be made in the ſaid ſtatutes; and that it might "be *convenient* that ſuch proviſions as ſhould be deemed neceſſary "for ſecuring to the ſaid Company the full benefit of ſuch ſole and "excluſive right, ſubject to the proviſions and limitations contained "in the ſaid act, and for reſtraining all clandeſtine and illicit trade "to, in, and from the ſaid *Eaſt Indies* and parts aforeſaid, ſhould "be *reduced into one act of parliament*." It is here ſtated very diſtinctly what the object was which the Legiſlature had in view and meant to provide for in this part of the act: they have ſaid, that the limitations and proviſions in this act contained, concerning the future conduct of the *Eaſt India* trade, require that ſome alter-

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ations ſhould be made in the ſtatutes for ſecuring the excluſive trade, and for reſtraining the illicit and clandeſtine trade; and they have ſaid that it would be convenient that ſuch proviſions as ſhould be deemed neceſſary for ſecuring the excluſive trade, and for reſtraining the clandeſtine and illicit trade, ſhould be reduced into one act of parliament; they proceed accordingly to make thoſe alterations, and to reduce thoſe proviſions into this act. The 129th ſection proceeds to enact in the terms of former exiſting laws, that ſhips, *&c.* of unlicenſed perſons, trading within the limits of the *Eaſt India* Company, ſhould be forfeited. The ſucceeding ſections enact, that perſons going to thoſe parts are to be deemed to have traded unlawfully, are to be liable to fine and impriſonment, may be arreſted and ſent to *England* for trial, with various other regulations in the terms of the former exiſting laws. For the purpoſe of effecting the reduction of the proviſions for ſecuring the excluſive trade, and for reſtraining the clandeſtine and illicit trade, into this act, the 146th ſection repeals ſo much of the 9 & 10 *W.* 3. *c.* 44. as inflicts any penalty or forfeiture for illegally trading to the *Eaſt Indies*; the whole of the ſtatute of 5 *Geo.* 1. *c.* 21.; ſo much of an act of the 7 *Geo.* 1. *c.* 21. as relates to the puniſhment or proſecution of perſons illegally trading to the *Eaſt Indies*; the whole of the ſtatute of 9 *Geo.* 1. *c.* 26.; ſo much of the ſtatutes 3 *Geo.* 2. *c.* 14. and 17 *Geo.* 2. *c.* 17. as create any penalty or forfeiture; and ſo much of 10 *Geo.* 3. *c.* 47. as ſubjects any perſons concerned in the illicit trade to, in, or from the *Eaſt Indies* to any penalty; parts of ſome other ſtatutes not immediately relating to the excluſive trade, and therefore not neceſſary to be enumerated; and, laſtly, ſo much of 26 *Geo.* 3. *c.* 57. as makes offences againſt any law for ſecuring the excluſive trade of the Company, and forfeitures and penalties for illicitly trading, proſecutable in the *Eaſt Indies*.

Mr. *Wood*, of counſel for the Plaintiffs, arguing upon the effect of the repeal of part of the ſtatute of 9 & 10 *Will.* 3. inſiſted, that though the free trade of the *Eaſt India* Company was left untouched, ſo much of the ſtatute of King *William* as granted an excluſive trade was repealed. This was a very material point for him to maintain; but it is wholly unfounded; it will be found to be warranted neither by the letter nor the ſpirit of the ſtatute of 33 *Geo.* 3. The 81ſt ſection of the ſtatute 9 & 10 *Will.* 3. enacts, that after the 29th *September* 1698, ſuch perſons or corporations as had power to trade to the *Eaſt Indies* ſhould have the ſole trade; and provides, that the *Eaſt Indies* ſhould not be viſited by any other of the king's ſubjects during the time this trade was to continue. It then pro-

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ceeds to impoſe penalties on ſuch others of the King's ſubjects as ſhould trade there. The ſection therefore conſiſts of at leaſt two if not three different branches; the firſt makes the trade excluſive in the Company; the ſecond is a prohibition to the reſt of the King's ſubjects; the third impoſes penalties. The repeal of a part of this ſtatute by 33 *Geo.* 3. does not import to be a repeal of the whole ſection; it does not even import to be a repeal of the prohibition; it repeals in terms ſo much only of the ſtatute as inflicts any penalty or forfeiture, which is the third branch of the ſection. It is clear therefore that ſo much of this ſtatute as grants the excluſive trade is not within the letter of the repealing clauſe of 33 *Geo.* 3.; and it is equally clear that it is not within the ſpirit of it. The whole operation of this part of the ſtatute was meant to be confined to the regulation and re-enacting in one act the proviſions made to ſecure the excluſive trade, and to reſtrain the illicit and clandeſtine trade; it was not neceſſary to any effect, which this part of the ſtatute of 33 *Geo.* 3. was to produce, that the excluſive trade ſhould be touched by the ſtatute. Parliament in its juſtice could not meddle with it during the term for which it was to continue. It had been purchaſed by the *Eaſt India* Company. There is an apparent abſurdity in the notion, that this could be the ſubject of any of the repealing clauſes; its exiſtence in full abſolute and indefeaſible right is the foundation of the whole of this parliamentary regulation. If parliament had meant to make the excluſive trade granted by the ſtatute of King *William* the ſubject of its repealing clauſe, would it have paſſed over wholly unnoticed the ſeveral ſtatutes which have from time to time continued to the Company their excluſive trade down to and beyond the preſent hour, and above all would it have omitted to re-grant it, when it was re-enacting all the proviſions for ſecuring it? If it was touched by the repealing clauſe, for any thing I can ſee to the contrary, it is gone for ever; for certainly it is not re-enacted, unleſs we are to ſay, that being repealed by implication it ſhall alſo be re-granted by implication. But I waſte too much time upon ſo plain a propoſition. I ſtate it as clear, that the ſtatute of 33 *Geo.* 3. has left the excluſive trade of the *Eaſt India* Company untouched. The conſequence is of importance in this argument; it lays the 150th ſection of this ſtatute, which has been the ſubject of ſo much elaborate diſcuſſion, quite out of the caſe. A ſtatement of this ſection, and a ſhort examination of it, and a compariſon of it with its context will make this moſt manifeſt. The 150th ſection is in theſe words: "And for obviating any doubts which might otherwiſe

“ ariſe how far any of his Majeſty's ſubjects may, notwithſtanding “ the aforeſaid repeal of the ſeveral acts or parts of acts, be entitled “ to recover any debts due to them in *Great Britain* or in parts “ beyond the ſeas, or otherwiſe to enforce the execution of any “ contracts or agreements by reaſon of any pretext to be ſet up “ by any other perſon or perſons that ſuch debts were contracted, “ or that ſuch contracts or agreements were made contrary to the “ reſtrictions or prohibitions in the ſaid acts or ſome of them contained; be it further enacted that it ſhall not be competent or “ lawful to or for any Defendant or Defendants in any ſuit or action “ now depending or hereafter to be brought in any Court either in “ *Great Britain* or in the *Eaſt Indies* to plead or ſet up any act or “ acts in the whole or in part repealed by this act in bar of any ſuch “ ſuit or action or of any judgment or recovery to be obtained “ therein, but that the Plaintiff or Plaintiffs in all and every ſuch “ ſuits or actions as well in law as in equity ſhall have the ſame “ remedy to recover, and be entitled to the like judgment, verdict, decree, and execution as if the ſaid acts or parts of acts “ ſo repealed had never been made.” I need not remark, that this is a very ill penned clauſe; with its context however it does not appear to me that it would be very difficult to expound it. For the purpoſe of introducing ſome alterations and of re-enacting in this act the ſubſtance of the proviſions of former laws impoſing certain penalties and forfeitures, the whole of ſome of thoſe laws and ſuch parts of others of them as impoſe penalties and forfeitures were repealed, but with two proviſoes; the 1ſt, that ſuch repeal ſhould be no bar to proſecutions for offences in reſpect of which thoſe acts and parts of acts repealed had impoſed penalties; the 2d, that ſuch repeal ſhould be a bar to a defence in a civil action, on the ground, that the contract which was the ſubject of that action, was contrary to the reſtrictions or prohibitions in the ſaid acts or parts of acts ſo repealed. This laſt proviſo in the 150th ſection contains no general proviſion, making the illicit and clandeſtine trade lawful, but contraſting actions for debts and upon contract with offences; it provides, that the repeal ſhall have all the effect it can have in the former caſe to enable a creditor to recover his debts (in which reſpect it has been called, not improperly, an Act of Grace); and that it ſhall have no effect at all in the latter caſe, to prevent an offender from being puniſhed for his offence. If therefore the trade of the interloper is made unlawful, illicit, and clandeſtine, only by the acts and parts of acts repealed, then by force of this proviſo no advantage is to be taken by way of defence in a civil action of this illegality; but if it is unlawful and clandeſtine upon other and higher grounds, as it will be found to be, this proviſo affords no protection againſt the defence of illegality, and muſt be laid entirely out of the caſe. Theſe Plaintiffs, if they ſhould be driven from this which has been conſidered as their ſtrong hold, may ſtill inſiſt that the excluſive trade of the Company is no more than their private right, the infringement of which may perhaps give a right of action to the Company, as for a civil injury over and above the ſeveral parliamentary proviſions which have been made for ſecuring it, but can have no further effect, and particularly cannot taint with illegality, tranſactions and contracts which are collateral to it. Suppoſe for inſtance a printer were to bring his action againſt his employer for printing a pirated copy of a work protected by the ſtatute of Queen *Ann*. The employer perhaps could not object by way of defence againſt this action, that the printing as an infringement of the private right of the author was unlawful, and the contract void in law. When this point was ſuggeſted, in the courſe of the argument Mr. *Rous* anſwered, that the excluſive trade of the Company was a public regulation of the national commerce, and this was a very good general anſwer; but I will enter a little further into the diſcuſſion of it. This excluſive trade of the *Eaſt India* Company is now ſo interwoven with the general intereſts of the ſtate, that it is no longer to be conſidered as the private right of a corporation, but is become a great national concern, and the infringement of it is a public miſchief and a public wrong, and as ſuch is prohibited by the common law. The principle, and the effect of that prohibition, as applied to the preſent caſe, may be collected from the caſe of a bond given to the ſheriff to indemnify him againſt the voluntary eſcape of his priſoner, which is pronounced to be void by the common law. That caſe is put in *Beawſage*'s caſe, 10 *Co.* 100. and is recognized in the books of the beſt authority in our law, *viz. Yelv.*, *Dyer*, *Hobart*, and *Plowden*. The references are in the margin of 10 *Co. fo.* 100. (*a*) If we conſider it in one ſingle point of view, as it regards the public revenue of the ſtate, it will be found to be no leſs the right of the public than of the *Eaſt India* Company. That parliament has ſo conſidered it may be collected from the preambles of the ſtatutes made for the protection of this trade. The preamble of the ſtatute 5 *Geo.* 1. *c.* 21. recites it to be of great *importance* to the *welfare* of this kingdom, that this

(*a*) *Yelv.* 197. *Dyer* 324. *pl.* 32, 33. *Hob.* 14. *Plowd.* 64. *b.* 67. *b.* 68. *b.*

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trade ſhould be regulated according to the acts of parliament relating thereto, and the royal charters or grants made in purſuance thereof. This ſtatute recites ſome of the proviſions of 9 & 10 *W.* 3. and that it is provided by that act and by ſubſequent laws that the merchandize to be laden upon ſhips bound from the *Eaſt Indies* ſhould be brought to *Great Britain*, and that ſeveral of his Majeſty's ſubjects have preſumed to trade to the *Eaſt Indies* in foreign and other ſhips, intending there to load goods, and to bring them into *Europe*, and land them in foreign parts out of his Majeſty's dominions, to the great prejudice of the trade of this kingdom, and the *diminution of his Majeſty's cuſtoms and other duties.* It recites a proclamation iſſued to prevent theſe practices, and that evil diſpoſed perſons had ſtill gone on to procure foreign commiſſions, and under colour thereof, or otherwiſe, had fitted out and manned ſeveral *Engliſh* and other ſhips, and had ſent them to trade in the *Eaſt Indies*; and after this preamble, it introduces the proviſions of the act, with theſe memorable words: "Now to "the intent that *ſuch colluſive, fraudulent, and illegal trade and* "*practices* may be prevented, and that ſo conſiderable and beneficial "a branch of trade may be ſecured to this kingdom; be it enact- "ed, *&c.*" The preamble of the 7 *Geo.* 1. *c.* 21. is yet ſtronger: "Whereas it is of importance to the welfare of this kingdom "that the trade to and from the *Eaſt Indies* be carried on in ſuch "manner as that the *Britiſh* nation may have and enjoy the full "fruits and advantages thereof: And whereas by virtue of ſeveral "acts of parliament and letters patent the whole trade to and from "the *Eaſt Indies* is now ſolely veſted in the United Company, *&c.* "notwithſtanding which, and the prohibitions, injunctions, and pe- "nalties contained in ſuch acts and letters patent, ſeveral evil minded "perſons, ſubjects of his Majeſty, preferring their own private gain "to the good of their country, have not only clandeſtinely traded "to the *Eaſt Indies*, but by colour of commiſſions from foreign "governments have fitted out ſhips and engaged *Britiſh* ſeamen "to ſerve on board the ſame, and ſent them to the *Eaſt Indies*, to "the diminution of his Majeſty's revenue and of the naval force "and commerce of this kingdom: Now to the intent that ſuch "*wicked, miſchievous*, and *deſtructive practices* may be prevented "for the future, and that the trade aforeſaid may be more effec- "tually guarded and ſucceſsfully carried on," *&c.* The ſtatute then proceeds to make ſeveral proviſions, upon which I ſhall only obſerve here, that they are calculated to prevent the evil of the clandeſtine trade in general, and that the circumſtance of the foreign

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foreign commiſſion is conſidered only as one of the modes in which that trade was carried on. If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign ſpirits bought or ſold in the courſe of a contraband trade, we ſay without heſitation, this is a contract againſt law, and no action can be maintained upon it, and if the action were founded upon a policy of aſſurance upon a ſhip, or goods, employed or carried in the courſe of that contraband trade, we ſhould not heſitate to ſay, that no action lies upon ſuch a policy; and ſurely it muſt be a reproach to law and juſtice if we were now to countenance an action upon this policy, the object of which is, to aſſure to theſe Plaintiffs the ſafety of a ſhip engaged in a trade ſo illicit and clandeſtine as this trade has been declared by parliament to be, under ſuch aggravated circumſtances of fraud and colluſion, in the manner of carrying it on, as are deſcribed in this ſpecial verdict, and which it might have been reaſonably ſuppoſed no man who had a regard for his reputation as a merchant, or had any ſenſe of truth and private honour, would have ſuffered to have ſtood againſt him upon the public records of one of the King's ſupreme Courts of juſtice. Let this judgment be affirmed.

Judgment affirmed.

In this Term *Baker John Sellon* of the *Inner Temple*, Eſq. was called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"*Reſpice quid moneant Leges.*"

END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

In the Thirty-eighth Year of the Reign of GEORGE III.

WEBB *v.* HERNE and Another, Sheriff of MIDDLESEX.

June 15th.

In eſcape againſt the ſheriff, if the Plaintiff aver in his declaration, that *J. S.* was arreſted "under a writ indorſed for bail, by virtue of an affidavit now on record" he muſt produce the affidavit in evidence, though the latter part of the averment was unneceſſary.

ESCAPE againſt the ſheriff. The Plaintiff in his declaration ſtated that *J. S.* was arreſted "under a writ indorſed for "bail, by virtue of an affidavit now on record," and gave the ſheriff notice to produce the writ, which not having been complied with, he called the attorney, who at the trial proved from an entry in his book that ſuch a writ had been iſſued. Though this was not the next beſt evidence, no objection was taken on that head; but it was contended for the Defendant, that the words "by virtue of an affidavit now on record" being a ſubſtantive allegation, muſt be proved; and the Plaintiff not being able to produce the affidavit, *Eyre* Ch. J., before whom the cauſe was tried, nonſuited him.

Shepherd Serjt. now moved for a rule *niſi* to ſet aſide the nonſuit, and contended that it was not neceſſary to produce the affidavit, for had the ſheriff enabled the Plaintiff to ſhew the writ itſelf, it would have ſufficiently appeared that it was indorſed for bail.

Buller J. I remember a caſe in Lord *Mansfield*'s time where it was held unneceſſary to produce the affidavit, but the declaration there differed from the preſent one, ſince it only ſtated generally that a writ was ſued out "indorſed for bail £.—— (a)."

Eyre Ch. J. If I had underſtood this to have been ſuch a caſe, I ſhould have left the evidence to the jury: but it appeared to me that there was a ſubſtantive allegation of the exiſtence of an affidavit, which muſt be proved.

Shepherd took nothing by his motion (b).

(a) See *Croke* v. *Dowling*, *E.* 22 *G.* 3. *Bull. N. P.* 14. laſt ed. and *Rogers* v. *Ilſcombe*, *Taunton*, *Lent* Aſſ. 1785. *Eſp. N. P.* 535.

(b) See *Savage* v. *Smith*, 2 *Bl.* 1101. *Briſtow* v. *Wright*, *Doug.* 665. 3d ed. alſo what is ſaid by *Buller* J. in the King v. *Holt*, 5 *T. R.* 446. and *Peppin* v. *Solomons*, 5 *T. R.* 497.

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It ſeems that a cuſtom for the homage to aſſeſs a compenſation in lieu of a heriot, to be paid by an in-coming copyholder on ſurrender or alienation, is not good. If the lord ſet up a cuſtom to have the beſt live or dead chattel as a heriot, *quære* if the tenant can modify that cuſtom by pleading another, that the homage ſhall aſſeſs a compenſation in lieu of the heriot?

Replevin of a cow.

Avowries. 1ſt, For that the ſaid cow at the time of taking the ſame, was the property of the Defendant. 2d, For that the place in which, &c. was parcel of a certain tenement ſituate in the townſhip and manor of *Marſden*, and held of that manor, of which manor the Defendant at the time of the taking was lord, and becauſe a heriot, that is to ſay, the beſt beaſt of the Plaintiff was due, and not delivered to the Defendant for the ſaid tenement, the Defendant well avowed, &c. 3d, For that the place in which, &c. was parcel of a certain cuſtomary tenement ſituate in the townſhip and manor of *Marſden*, within which manor from time whereof, &c. there had been divers cuſtomary tenements demiſed and demiſeable by copy of the Court Rolls of the manor by the lord of the manor and his ſteward for the time being, to any perſons willing to take the ſame in fee-ſimple, or otherwiſe at the will of the lord according to the cuſtom of the manor, and that within the manor, there was, and for all the time aforeſaid had been a certain ancient and laudable cuſtom uſed and approved of, that is to ſay, that the lord of the manor for the time being from time whereof, &c. had been uſed and accuſtomed to take and have upon the admiſſion of every cuſtomary tenant of the manor to every ſuch cuſtomary tenement to which ſuch tenant had been admitted, upon the ſurrender or alienation of any former tenant of ſuch cuſtomary tenement, the beſt chattel, alive

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alive or dead, of ſuch tenant ſo admitted as aforeſaid upon ſuch ſurrender or alienation, after ſuch his admiſſion to the ſame tenement, for and in the name of a heriot for ſuch cuſtomary tenement: that the tenement of which the place in which, &c. was parcel, was from time whereof, &c. parcel of the ſaid manor and a cuſtomary tenement; that the Defendant was lord of the manor; that in 1786 one *J. H.* had been admitted tenant of the ſaid cuſtomary tenement; that in 1792 *J. H.* ſurrendered into the hands of the Defendant to the uſe of the Plaintiff and his heirs; that the Plaintiff was admitted, and entered, and was ſtill ſeiſed thereof; and becauſe at the time when he was ſo admitted, and from thence until and at the ſaid time when, &c. he was poſſeſſed of the ſaid cow as of his own proper cow, the Defendant well avowed the taking the ſaid cow as the beſt living chattel at the time of the Plaintiff's admiſſion, for and in the name of a heriot; and this, &c. wherefore, &c. 4th, The ſame as the laſt, only ſtating the cuſtom for the landlord to take "the beſt beaſt," inſtead of "the "beſt chattel alive or dead."

Pleas in bar. 1ſt, Iſſue on the firſt avowry. 2d, That the heriot was not due as alleged in the ſecond avowry, and iſſue thereon. 3d, Traverſe of the cuſtom in the third avowry. 4th, Traverſe of the cuſtom in the laſt avowry. 5th, That in the ſaid manor in the third avowry mentioned there had been from time whereof, &c. a certain other ancient and laudable cuſtom uſed and approved within the ſame, that is to ſay, that at the Court Baron of the lord of the ſaid manor for the time being, held in and for the ſaid manor, the homage of the ſaid Court Baron from time whereof, &c. had been uſed and accuſtomed to aſſeſs upon their oaths a reaſonable ſum of money to be paid upon the admiſſion of every cuſtomary tenant, to any cuſtomary tenement to which ſuch tenant had been admitted, upon the ſurrender or alienation of any former tenant, after ſuch his admiſſion, in lieu of ſuch heriot by the ſaid cuſtom in the ſaid avowry claimed, and which ſame ſum of money ſo aſſeſſed ought to be paid to the lord of the manor by ſuch cuſtomary tenant, and ought to be accepted by ſuch lord in lieu of ſuch heriot by the ſaid cuſtom in the ſaid avowry claimed. 6th, To the laſt avowry the ſame cuſtom as in the preceding plea. 7th, To the third avowry, that within the ſaid manor there was another cuſtom that every cuſtomary tenant upon his admiſſion ſhould pay to the lord, in lieu of ſuch heriot by the ſaid avowry claimed, ſuch reaſonable ſum of money as

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ſhould be agreed upon between ſuch lord and cuſtomary tenant; and if they ſhould diſagree about the ſame, then ſuch reaſonable ſum as ſhould be aſſeſſed by the Court Baron at the homage; and that when the ſaid ſum of money ſo agreed upon or aſſeſſed had remained unpaid after reaſonable requeſt and demand, the lord of the manor for the time being, from time whereof, &c. had been uſed and accuſtomed to take a reaſonable diſtreſs for the ſame. 8th, The ſame plea to the laſt avowry.

Replication tendering iſſue on the traverſes in the third and fourth pleas, and demurring to the fifth, ſixth, ſeventh, and eighth.

Rejoinder joining in iſſue and demurrer.

Cockell Serjt. in ſupport of the demurrer. 1ſt, The cuſtoms ſtated in the pleas in bar are unreaſonable and uncertain, and therefore bad. There is no criterion ſhewn by which the homage may judge how to aſſeſs a compenſation for the heriot, whereas ſome rule ought to appear by which the rights of the lord and the tenant may be preſerved. There is a caſe mentioned in *Noy* 2. by the name of the *Yelmeſter Cuſtom*, reported in *Noy* 3. by the name of *Crabb* v. *Bales*, and recognized in 1 *Rolle* 48. under the name of *Crabb* v. *Bevis*, where a cuſtom that a copyholder for life might nominate one or two that ſhould have the copyhold lands after his death for a fine to be aſſeſſed by the homage, if they could agree with the lord, was adjudged to be good. But this ſeems to be anſwered by *Bill's* caſe, 4 *Leon.* 238. where the ſame cuſtom was held good, only with this qualification, *viz.* that the ſum aſſeſſed ſhould not be "leſſer than had uſed to be paid where the lord "would aſſeſs a reaſonable fine." 2dly, Suppoſing the cuſtoms to be good, yet as it is admitted on the pleadings that the lord has a right to the heriot, though ſubject to a compenſation to be aſſeſſed by the homage, it ſhould have been ſtated either that ſome compenſation had been aſſeſſed, or that ſome ſtep towards an aſſeſſment had been taken.

Clayton Serjt. *contrà*. We have a right to modify the cuſtom ſtated by the Defendant, by ſetting up another cuſtom on our part; for a heriot not being due of common right, but the mere creature of cuſtom, ought to be regulated by cuſtom. No caſes have been cited to prove this cuſtom unreaſonable or uncertain; nor is the diſcretion of the homage more arbitrary in this caſe than in all caſes where juries are to decide. The caſe in *Noy* is of no ſlight authority, having been recognized in 1 *Rolle* 48. and in *Perkins* v. *Titus*, 3 *Mod.* 134. Certainly the cuſtom here is not

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more unreaſonable than that which was held good in *Wallis*'s caſe, *Cro. Jac.* 555. As to the ſecond point, it is the buſineſs of the lord whoſe tortious act is complained of, to ſet out what is neceſſary to his own juſtification.

Eyre Ch. J. My difficulty is, how to incorporate the two cuſtoms. The landlord pleads a cuſtom to have the beſt live or dead chattel as a heriot; the tenant anſwers that he is not entitled to the beſt live or dead chattel, but to a ſum of money by way of compenſation. This is pleaded two ways, firſt, as a ſum of money to be aſſeſſed abſolutely by the homage; ſecondly, as a ſum to be agreed upon by the landlord and tenant, and on failure of an agreement then to be aſſeſſed by the homage. Either of theſe pleas is an abſolute denial of the cuſtom that the lord ſhould have the beſt live or dead chattel. This compenſation is pleaded to be *in lieu* of a heriot; but ſince it is ſtated not to depend upon the will either of lord or tenant, but to take place in all caſes, it cannot be *in lieu*; it ought therefore to have been ſtated in the name of a heriot, and as an inducement to a traverſe. If the Plaintiff had ſaid, true there is ſuch a cuſtom, but if the tenant prefer to pay a ſum of money in lieu, then he ſhall pay ſuch a ſum as the parties ſhall agree upon, that would have been a modification of the cuſtom, and the money would have come in lieu of the original right of the landlord, but here the original right is ſtated in two contradictory ways (a).

Buller J. I am not quite clear that the cuſtoms ſtated on theſe pleas may not ſtand together, as well as thoſe in *Kenchin* v. *Knight* (b). No anſwer however has been given to the argument advanced againſt the goodneſs of the cuſtom ſet up by the pleas in bar, *viz.* that there is no rule to direct the jury in aſſeſſing the amount of the compenſation. I think the cuſtom bad.

Heath J. All the members of the homage are liable to pay this compenſation, and are therefore intereſted in the aſſeſſment. Suppoſe a cuſtom that the pariſhioners of a certain pariſh ſhould aſſeſs a compenſation to be paid to the rector in lieu of tithes; it would be void as unreaſonable and uncertain. In the caſe in *Leonard* the landlord could never be injured by the aſſeſſment, and he might be put in a better ſituation.

Rooke J. I have not the ſame difficulty with reſpect to the cuſtom. A heriot is not due of common right as tithes are, but is the mere creature of cuſtom. The lord has no right but by cuſtom, which is the life of copyhold. This is a claim of the firſt impreſſion, for the lord does not claim from the out-going tenant, but from the in-coming tenant, who is to have his beſt beaſt taken from him: and yet I conceive that it may be good and reaſonable that the in-coming tenant ſhould pay ſuch a ſum of money by way of acknowledgment to the landlord, as the homage ſhall aſſeſs. However I incline to think that the plea in bar is not well pleaded.

(a) *Vide Bland* v. *Moſeley, cit.* 9 *Rep.* 58. *Spooner* v. *Day and Another, Cro. Car.* 432. and *Murgatroid* v. *Law, Carth.* 117.

(b) 1 *Bl.* 49. 1 *Wilſ.* 233. *B. R.*

The Court then offered a ſecond argument, which being declined by the parties who meant to go to trial on the iſſues joined, the Court ſaid that as they were all of opinion, though on different grounds, that the demurrer muſt prevail, they ſhould give

Judgment for the Defendant.

June 18th.

STOCK *v.* MAWSON.

The creditors of a bankrupt entered into a deed of compoſition to receive 8 *s.* in the pound in full diſcharge of their debts, and agreed to releaſe every thing beyond that to the bankrupt and join in a petition to the Chancellor, to ſuperſede the commiſſion; one of the creditors having two diſtinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8 *s.* in the pound on both debts, and then recovered the full value of ſome of the bills; held that the bankrupt was entitled to ſue for the money ſo obtained on the bills in an action for money had and received.

THIS was an action for money had and received. The circumſtances were as follow. A commiſſion of bankrupt having iſſued againſt the Plaintiff, and an aſſignment of his effects having been executed under that commiſſion, the creditors, of whom the Defendant was one, entered into a deed of compoſition with the Plaintiff, wherein, after reciting the commiſſion and aſſignment, they agreed to accept 8 *s.* in the pound "upon the amount of their reſpective debts, and "in full diſcharge thereof," to be ſecured by the promiſſory notes of three ſureties, and in conſideration thereof "to releaſe and "diſcharge the ſaid *William Stock*, his heirs, executors, and admi-"niſtrators, eſtate and effects, of and from the debts to them due "and owing from him," and to join in a petition to ſuperſede the commiſſion. The deed then went on with a general releaſe "of "all actions, ſuits, debts, ſums of money, accounts, reckonings, "damages, claims, and demands whatſoever, both in law and "equity," and relinquiſhed and gave up to the Plaintiff, his executors, adminiſtrators, and aſſigns, "all and ſingular the ſtock in "trade, houſehold goods, plate, china, linen, and furniture, book "debts, and other debts and ſums of money due, owing, or belong-"ing to him, from any perſon or perſons whomſoever, and all "bonds, bills, notes, and other ſecurities for the ſame; and all "other the eſtate and effects whatſoever of the ſaid *William Stock*, "whereof or wherein he the ſaid *William Stock*, or any perſon or "perſons in truſt for him or for his uſe, was or were ſeiſed or "poſſeſſed or intereſted on the day of the date and iſſuing forth of

“ the ſaid commiſſion, and on any day ſince, and all benefit and “ advantage whatſoever to be made, had, or derived thereby or “ therefrom.” At the time when this deed was executed the Plaintiff was indebted to the Defendant in two different ſums of money on two different accounts, *viz.* 1113 *l.* 19 *s.* 5 *d.* and 1107 *l.* 5 *s.* 5 *d.*, for ſecuring the latter of which he had given the Defendant bills to the full amount. The whole 2221 *l.* 4 *s.* 10 *d.* was proved, and a dividend of 8 *s.* in the pound received by the Defendant on that ſum; after which he called upon the acceptors of the bills and obtained on one of them 20 *s.* in the pound and different ſums upon the others, conſidering himſelf indeed as a truſtee for the Plaintiff, to the amount of all which he received above 12 *s.* in the pound on any of the bills, but retaining that ſum for which the preſent action was brought.

The cauſe was tried before *Rooke* J. at the *Guildhall* ſittings after *Eaſter* term, when a verdict was found for the Plaintiff for 116 *l.* A rule having been obtained on a former day to ſhew cauſe why this verdict ſhould not be ſet aſide and a new trial had,

Le Blanc and *Shepherd* Serjts. now ſhewed cauſe. This queſtion will depend on the conſtruction of the deed. It will be contended that the deed being ſubſtituted in the place of a commiſſion of bankruptcy, the parties muſt ſtand in the ſame ſituation under the former, as they would have done under the latter; whereas the rules which apply to an adverſe proceeding under a commiſſion, cannot be any guide to the court in conſtruing the terms of a deed executed between the parties. The commiſſion was done away, and the parties were placed in a new ſituation; ſince the creditors obtained the ſecurity of three ſolvent perſons for a certain definite ſum; a ſecurity which they could not have had under the commiſſion. The bills in queſtion were either accommodation bills, or drawn for value in the hands of the acceptors, in either of which caſes the Defendant has violated his agreement to leave the Plaintiff in full poſſeſſion of his eſtate. If they were accommodation bills, a debt has been created againſt the eſtate of the Plaintiff, which would not have exiſted if the acceptors had not been called upon, and if on the other hand they were drawn for value, payment of thoſe bills by the acceptors is a diſcharge of a debt which they owed to the Plaintiff's eſtate. Beſides the Defendant has committed a fraud on the other creditors, who expected to be put upon an equal footing with him, and who perhaps might

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not have executed the deed if they had ſuppoſed that he was to receive twenty ſhillings in the pound on any of his debts.

Adair and *Palmer* Serjts. in ſupport of the rule. It is clear that under the bankrupt laws, the great object of which is to eſtabliſh an equal diviſion among the creditors, the Defendant would be allowed to retain what he has received to the amount of 20 *s.* in the pound; *Ex parte Wildman*, 1 *Atk.* 109.: now the deed in queſtion being ſubſtituted in their place, he ought to be entitled to the ſame advantage. The object of this deed is the mutual benefit of the creditors and the inſolvent; the latter is inſtantly put in the ſituation which he might hope to attain, after a long delay, under the bankrupt laws; the former have the payment of a certain ſum ſecured to them, in conſideration of which they agree to releaſe all demands upon the bankrupt, though not on any other perſons. Indeed, ſhould the eſtate of the inſolvent produce more than 8 *s.* in the pound, ſtill the creditors bar themſelves by this deed, from claiming any further ſum out of that eſtate. This queſtion depends upon two clauſes in the deed, *viz.* that of releaſe and that of reſtitution; now releaſe to the drawer is no releaſe to the acceptor, who by his acceptance of the bill has made himſelf the original debtor; *Dingwall* v. *Dunſter*, *Doug.* 247: and by the clauſe of reſtitution nothing could be reſtored to the bankrupt but what he had loſt by the transfer to the aſſignees, of which the ſecurities in the hands of the Defendant were no part. Admitting, however, the acceptor to have been diſcharged, the money in queſtion has been received by the Defendant to his uſe, and not to that of the Plaintiff.

Eyre Ch. J. The only difficulty in my mind is, whether *Stock* has a right to bring this action for money had and received to his uſe. I am inclined to think, that on the true conſtruction of the deed of compoſition, it muſt be conſidered as a diſcharge of every body; the conſequence of which is, that the acceptors of the bills who have been called upon, have paid the money in their own wrong, and ought to recover it back. A ſolution of this difficulty was attempted by my Brother *Le Blanc* in arguing on the relation between the acceptor and the drawer. If the bills were accommodation bills, the acceptor would have a right to call on the drawer; it ſeems, therefore, that the money received by the Defendant was in fact part of the eſtate of the Plaintiff, and ought under the deed to be returned to him in order to enable him

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to ſatisfy the acceptor: if the bills were not accommodation bills, the money received by the Defendant was more immediately the eſtate of *Stock*, becauſe he has ſo much leſs in the acceptors hands in conſequence of the tranſaction. This caſe has been argued on an analogy which does not in fact exiſt; *viz.* between the effect of this deed, and the proceedings under a commiſſion of bankruptcy, though a commiſſion happened to be the foundation of the agreement. A commiſſion is a tranſaction between creditors only, the eſtate of the bankrupt is completely taken out of him, and he has no intereſt but in the actual ſurplus of that eſtate after all debts paid: here, on the other hand, the inſolvent had an intereſt in every thing beyond 8*s.* in the pound. It is on the ground of uncertainty that the rule has been allowed to prevail, that a bill holder may prove againſt every body who is a party to the bill, for until the dividends are aſcertained, it is impoſſible to know what ſatisfaction he will have. But here a certain liquidated ſum is given, and the creditor thinks it for his intereſt to conſider the whole as the debt of the drawer, and to accept 8*s.* in the pound as a ſatisfaction: this is the ſubſtance of the inſtrument; by this the debt is diſcharged and gone, and the effects are abſolutely releaſed. Suppoſe that the Plaintiff had paid 20*s.* in the pound, there can be no doubt, but that he would have become the purchaſer of the bills, and would be entitled to take them out of the hands of the holder and uſe them according to the relation in which he might ſtand to the acceptor. If it be ſo on payment of 20*s.* in the pound, can we diſtinguiſh the preſent caſe from that? The creditor has thought fit to accept 8*s.* in the pound in lieu of 20*s.*, and though this could not be pleaded on a parol agreement, yet on a deed it may, and the diſcharge is as effectual as if 20*s.* in money had been paid. I am therefore of opinion that this caſe has been argued on the ground of an analogy which does not exiſt, and admitting every thing advanced to be true with reſpect to the rule where debts are to be proved under different commiſſions, yet even there if a party has proved his debt under one commiſſion, and taken a dividend, he cannot prove the whole debt under another. The buſineſs is generally managed by not taking a dividend under any commiſſion till the debt has been proved under all, and there is no poſſibility of ſetting the matter right, but by calling the parties to an account. Here the debt is not only reduced to 8*s.* in the pound, but actually diſcharged, ſo as to entitle the

Plaintiff to ſtand in the place of the Defendant. The difficulty however recurs whether it does not lie with the acceptor to bring this action, and whether the money in diſpute muſt not be conſidered as his: if my Brothers can ſatiſfy me on this point, I ſhall have no heſitation on the reſt of the caſe.

BULLER J. The nature of the contract and deed on which this queſtion ariſes decides the caſe. *Stock* was indebted to ſeveral perſons: the creditors ſued out a commiſſion, but for the purpoſe of avoiding expence, and getting as great a ſatisfaction as poſſible, they came to an agreement that *Stock* ſhould provide ſecurity for 8*s.* in the pound, and that they would give up the remainder of their debts, and make him a new man. If there was any ſort of ſurpriſe by one creditor upon another, it is no new caſe to ſay that it was a fraud: one creditor is induced by another, to come into the compoſition, and they all agree by deed to take an equal dividend; now this is not effected by one of them reſerving a ſecret advantage. It is ſaid that the Defendant has not taken more than 8*s.* in the pound out of *Stock's* effects, but I ſay that he does get the ſurplus out of *Stock's* effects. Theſe were part of the bills which by agreement the Defendant was to reſtore, they came into his hands from *Stock*, and were to be delivered back to him, on payment of 8*s.* in the pound. By the mode of ſtating this account, the Defendant decides againſt himſelf; to give a foundation for the argument, he ſhould have purſued this method: he ſhould have ſaid, I have 1113*l.* 19*s.* 5*d.* due to me on one account, and 1107*l.* 5*s.* 5*d.* on another; he ſhould not have added the two together, but ſhould have claimed a dividend on the former ſum only, and have treated the latter as a debt ſatiſfied by the bills which he held in his hands; by not doing this he has committed a fraud on the reſt of the creditors, who expected to be put on an equal footing with him, and had a right to know his ſituation. Whether an agreement by parol to accept a ſmaller ſum in ſatiſfaction of a larger can be pleaded or not, I do not know: it was formerly conſidered that it could not, and was ſo decided in *Coke* (a). I think however that there are ſome late caſes to the contrary, and one in particular in Lord *Manſfield's* time, who ſaid, that if a party choſe to take a ſmaller ſum, why ſhould he not do it? There may be circumſtances under which ſuch an agreement might not only be fair but advantageous; it may be of more importance to a man to take 10*s.* to-day, than 20 *s.* to-morrow. If we look to the deed it is impoſſible to ſay that the word "bills" in the deed does not extend to the bills in this caſe. What other bills are there? Suppoſing (as we muſt) that theſe bills were drawn for value, until the acceptors pay them they are indebted to the drawer to their amount, and if *Stock* pays 8 *s.* in the pound in ſatisfaction of his debt, is he not to have the bills in order to recover from the acceptors? If indeed they were accommodation bills only, then unleſs they are to be delivered up to the Plaintiff, the acceptors will be bound to pay, and will have an action againſt *Stock*, who will thus be called upon for more than 8*s.* in the pound. Whichever way the caſe be ſtated, the Defendant has received more than 8*s.* in the pound.

(a) *Pinnel's* caſe, 5 *Co.* 117. where it was held that payment of a leſſer ſum at the time and place mentioned in the condition cannot be a ſatiſfaction for a greater; but if paid before the day or at another place it may. *Vide* alſo *Cumber* v. *Wane*, *Str.* 426.

HEATH J. I am of the ſame opinion, and ſhall bottom myſelf on the clear intention of the parties. There were three deſcriptions of perſons parties to the tranſaction, *viz.* the debtor, the creditors, and the ſureties; and it was agreed that the creditors ſhould take 8 *s.* in the pound in diſcharge of all debts. Now in order to induce the ſureties to guarantee the payment of the 8 *s.* in the pound it was neceſſary to take an account of the Plaintiff's property; in taking which account they muſt have conſidered what was in the hands of the acceptors of the bills. If the acceptors were intended to hold the money ſubject to further demands, the ſureties would not have guaranteed to that extent. It is ſaid that the Defendant has only purſued his remedy againſt third perſons; but in my opinion he has taken a double remedy againſt the eſtate of *Stock*; 1ſt, againſt his effects in his own hands, and 2dly, againſt his effects in the hands of the acceptors. My Lord's obſervations have ſatisfied me that there is no analogy between this caſe and the proceedings under a commiſſion of bankruptcy. But a queſtion has been made whether this action will lie for money had and received to the uſe of the Plaintiff. Now what is a bill of exchange? It is nothing but an order on the drawee to pay ſo much out of the effects of the drawer in his hands, and the acceptance is evidence in law that the acceptor has ſuch effects, if therefore a perſou receives any thing out of thoſe effects, he receives what belongs to the drawer who may recover it in this form of action.

ROOKE J. I am of the ſame opinion.

Poſtea to the Plaintiff.

June 18th.

FISHER *v.* M'NAMARA.

A priſoner after judgment againſt him may, notwithſtanding the allowance of a writ of error, be charged in execution.

THE Plaintiff in this caſe was proceeding after the allowance of a writ of error to charge the Defendant, then in cuſtody on meſne proceſs, in execution.

This was oppoſed by *Marſhall* Serjt.

But the Court ſaid that if the Defendant were not charged in execution ſhe would be ſuperſedeable (*a*), and that the Plaintiff therefore was only doing that which for his own ſecurity he was obliged to do.

(*a*) But a Plaintiff may ſhew for cauſe againſt a ſuperſedeas iſſuing, that the Defendant has ſued out a writ of error before the end of the two terms limited by the practice of the Court. 2 *Wilſ.* 380. *Garrett* v. *Mentall*, *C. B. R. H.* 26 *Geo.* 3.

June 18th.

FULHAM *v.* BAGSHAW.

The Court will not allow a Plaintiff to ſign judgment becauſe the Defendant refuſes to pay for half the paper books delivered to the Judges; this caſe being within the rule. *Hil.* 35 *Geo.* 3.

MARSHALL Serjt. oppoſed the arguing a demurrer in this caſe, on the ground that the Defendant's attorney had refuſed to pay for two of the paper books delivered to the Judges according to the rule of Court. *Mich.* 6 *G.* 2. *Imp. C. B.* 352. ed. 4.

The Court at firſt doubted, but upon inquiry finding that the Court of King's Bench (*a*) had conſidered a ſubſequent rule (*b*) (which had alſo been adopted in this court) ordering that no judgment ſhould be ſigned for non-payment of iſſue money, as controlling the former rule, ſaid they ſhould follow the ſame conſtruction, and held the money to be paid for the paper books as coming within that rule, and therefore refuſed to allow judgment to be ſigned without argument.

Shepherd Serjt. *contra.*

(*a*) *Fuller* v. *Oſborne*, 6 *T. R.* 477.

(*b*) *Hil.* 35 *Geo.* 3. It is ordered, that after the firſt day of next term no judgment ſhall be ſigned for non-payment of iſſue money, but that the iſſue money ſhall remain to be taxed as part of the coſts in the cauſe.

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QUICK & UX. *v.* Sir W. STAINES Knt. Sheriff.

June 18th.

If an executrix uſe the goods of her teſtator as her own, and afterwards marry, and then treat them as the goods of her huſband, ſhe ſhall not be allowed to object to their being taken in execution for her huſband's debt.

THIS was an action of trover for houſehold goods brought by the huſband and wife in right of the wife as executrix of her former huſband *M'Pherſon*, under the following circumſtances: *M'Pherſon* died about nine months previous to the action being brought, having made his widow his executrix, who continued in poſſeſſion of his goods, and about three months after his death married the Plaintiff *Quick*. During thoſe three months ſhe uſed the goods as her own, and after her marriage with *Quick* the goods were treated by them both as his. The Defendant having taken theſe goods in execution at the ſuit of a perſon who was a creditor both of *M'Pherſon* and of *Quick*, but who claimed them upon the preſent occaſion to ſatisfy the debt of the latter, received notice from the Plaintiffs that the effects which he had taken were the unadminiſtered goods of *M'Pherſon*.

EYRE Ch. J., before whom the cauſe was tried at the *Weſtminſter* ſittings after *Eaſter* term, being of opinion that a *devaſtavit* had been committed on the part of the executrix, by putting the effects of *M'Pherſon* into the hands of her ſecond huſband, directed a nonſuit againſt the Plaintiffs, with liberty to move to ſet it aſide and enter a verdict in their favour. Accordingly a rule *niſi* for that purpoſe having been obtained on a former day,

Shepherd Serjt. now ſhewed cauſe. It cannot be denied that the executrix has ſuch a property in the goods of her teſtator as to enable her to ſell and make a good title, though ſhe may render herſelf liable for a *devaſtavit*. Now the executrix in this caſe having firſt treated the goods as her own, and the Plaintiff *Quick* having ſince her marriage with him treated them as his, is ſufficient to ſhew that ſhe had given them up to him, which muſt have the ſame effect as if ſhe had ſold them. If by her conduct ſhe did not make theſe goods her own, what period of time can be ſtated at which the effects of a teſtator in the hands of an executor are to be conſidered as converted to the uſe of the executor? In *Farr* v. *Newman*, 4 *T. R.* 621, the Court ſeemed to conſider that if any thing had been done by the executor to raiſe ſuch a preſumption the goods might be conſidered as his own: and Lord *Kenyon* was of opinion that till the contrary be ſhewn the goods muſt be conſidered as the property of him in whoſe hands they are found. Here perhaps it may be contended that a claim is made by the executrix, but it muſt be remembered that ſhe claims againſt her own acts.

Le Blanc and *Clayton* Serjts. in ſupport of the rule. An executor does not take an abſolute property in the goods of his teſtator, but ſuch an one only as will enable him to fulfil the duties of his office. In this caſe *M'Pherſon* died leaving his widow in poſſeſſion of his goods in that houſe in which they had lived: ſhe never removed them, but they continued in the ſame houſe until and after her intermarriage with another perſon. At what period then did ſhe take poſſeſſion of the goods as her own? An executor may convey to another the goods of his teſtator for money, and inaſmuch as third perſons cannot know in what manner that money is applied, creditors cannot follow the goods. But an executor cannot deviſe the goods of his teſtator, nor are they forfeited by his attainder, nor are they liable to the bankrupt laws. *Howard* v. *Jemmet*, 3 *Burr.* 1369. If an executor pay the debts of his teſtator to the amount of the value of the goods, he continues in poſſeſſion of them as becoming the purchaſer. The old form of the action of treſpaſs by an executor againſt a perſon who takes the goods of the teſtator, ſhews the law; for the *gravamen* is "the "delaying of the execution of the will," *F. N. B.* 87. E. In *Ridler* v. *Punter*, *Cro. Eliz.* 291. a term in the hands of the huſband in right of his wife as adminiſtratrix, was held not to be extendible for his debt, though it had continued in his hands and had never been granted; and in *Farr* v. *Newman*, though the alteration of property was as great as in this caſe, yet it was held that the goods were not liable for the huſband's debt. Indeed it would be hard if the act of marriage alone were to make the executrix liable to a *devaſtavit*. It was ſaid by the Court in *Farr* v. *Newman* that if the ſheriff had any doubt to whom the goods belonged, he ſhould have ſummoned a jury *de proprietate probandâ*; and though it has been contended that the preſent caſe differs from that, ſince that was an action between two creditors, whereas this is an attempt by the executrix to diſaffirm her own acts, yet that argument is anſwered by the opinion of Lord *Kenyon*, 4 *T. R.* 647. *viz.* that it is too late to ſay that the poſſeſſion of goods is in all caſes concluſive evidence of property.

Eyre Ch. J. I was not aware at *niſi prius* that the caſe of *Farr* v. *Newman* had been decided in ſo ſolemn a manner, though if I had, it would have made no other difference than to make me wiſh that this caſe ſhould be put upon the record. The firſt objection to the authority of that caſe, as applying to this, ariſes from the form of the action, which was not the ſame as here; and the ſecond, from the difference of the parties. It is one thing whether a creditor ſhall inſiſt that an executor has been guilty of a *devaſtavit*, and another, whether the executor ſhall take advantage of his own wrong, and juſtify his own miſconduct by ſaying that the goods are not his but his teſtator's. The caſe of *Whale* v. *Booth* and others, cited 4 *T. R.* 625. is directly in the teeth of *Farr* v. *Newman.* I think however that this queſtion may be decided on a principle which will leave the latter caſe altogether untouched, *viz.* that the executrix had taken the goods to her own uſe. On that ground I ſhall have no difficulty in deciding: but we will look further into this queſtion.

Cur. adv. vult.

On the next day the opinion of the Court was delivered by

Eyre Ch. J. We have looked into the caſe of *Farr* v. *Newman* and the authorities there cited, and the Court adheres to the opinion, that this nonſuit ought not to be ſet aſide. We proceed on a ground which does not at all interfere with the caſe of *Farr* v. *Newman;* as to which I ſhall ſay nothing either one way or the other. The ground of our deciſion is that originally taken, *viz.* that a *devaſtavit* has been committed by the executrix, who before her marriage had converted the goods. I allow that it would be hard (as it was argued) if the mere act of marriage had worked a *devaſtavit*; and we do not hold that. But when in conſequence of the marriage the effects were permitted to come into the hands of the huſband and to be uſed by him, then at leaſt, if not before, a clear *devaſtavit* was committed, ſince that conduct amounted to a converſion of the goods. We think that where the executrix herſelf or her huſband have converted the goods, it does not lie in the mouth of either of them to ſay that they are not the property of the huſband, in a caſe between the executrix and one of his creditors. We do not ſay any thing with reſpect to the queſtion, as between creditors of the original teſtator purſuing the aſſets with legal diligence, or the executrix in reſpect of thoſe aſſets, and creditors of the executrix or the huſband of the executrix, whether they ſhall or ſhall not have a preference againſt a creditor of the executrix. That queſtion will be fit to be conſidered when it ariſes, and then we ſhall decide it, with a proper reſpect for the caſe of *Farr* v. *Newman* contraſted with the caſe of *Whale* v.

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Booth, before Lord *Mansfield*, with the other caſes to be found in the books upon the ſubject, and with the general principles of law relating to the goods of teſtators and inteſtates, and the nature of a claim made on their repreſentatives in reſpect of thoſe goods. It may be a difficult queſtion, but it is not now to be touched.

Per Curiam, Rule diſcharged.

June 19th.

FARMER *v.* RUSSELL and Another.

If *A.* receive money of *B.* to the uſe of *C.*, it may be recovered by *C.* in an action for money had and received, though the conſideration on which *B.* paid it be illegal. *Quær.* Whether the caſe would be varied if *A.* were a party to the contract between *B.* and *C.*?

ASSUMPSIT againſt the Defendants, who were common carriers. The firſt count in the declaration was on a ſpecial agreement not to deliver the goods in queſtion without receiving the money for them; the other counts were general, among which was one for money had and received. At the trial it was proved on the part of the Plaintiff that he had agreed to carry certain goods called medals, and to deliver them to a perſon at *Portſmouth*; that they were taken by the carriers *on delivery*, the meaning of which term is that the carriers are to receive 2*d.* in the pound for commiſſion, and are not to deliver the goods without receiving payment for them. It appeared, however, that theſe medals were in fact counterfeit halfpence ſent to *Portſmouth* for the purpoſe of being diſtributed among the ſailors: but no other knowledge of the contents of the boxes in which theſe goods were packed could be brought home to the Defendants, than what might be implied from the circumſtance of one of the boxes having been accidentally opened in the preſence of a clerk of the Defendants, who ſaw the counterfeit halfpence (*a*). The Defendants had received money from the perſon at *Portſmouth*, and had accounted to the Plaintiff for the whole of it except 13*l.*, the ſubject of the preſent action. *Rooke* J., before whom the cauſe was tried at the *Guildhall* ſittings after *Eaſter* term, told the jury that if the counterfeit halfpence were ſent as an impoſition on the public, the contract between theſe parties was illegal, and no action could ariſe out of it, and that the carriers did not ſeem to him wholly exempt from crime, as they appeared to be acquainted with the nature of the goods. Accordingly a verdict was found for the Defendants, with leave to move to ſet it aſide, and enter a verdict for the Plaintiffs, if the Court ſhould be of that opinion.

(*a*) This fact was ſtated in the report of Mr. Juſtice *Rooke*, but ſome doubts were afterwards expreſſed by him with reſpect to its having been proved.

A rule *niſi* for that purpoſe having been obtained by *Cockell* Serjt. on the authority of *Tenant* v. *Elliott*, *ante*, p. 3.

Adair and *Shepherd* Serjts. now ſhewed cauſe. Admitting that there was no direct evidence to prove that the Defendants knew the nature of the goods committed to their care, ſtill in legal conſtruction this was not money received to the uſe of the Plaintiff. This caſe may be diſtinguiſhed from that of *Tenant* v. *Elliott*, as the contract was founded not only on *malum prohibitum*, being contrary to act of parliament, but alſo on *malum in ſe*, being contrary to common honeſty, and a fraud on all mankind; whereas the contract in *Tenant* v. *Elliott* was only made illegal by poſitive law. A Plaintiff muſt recover on his own ſtrength, not on the innocence of the Defendant. If *A.* pay money into the hands of *B.* to be paid to *C.* for the aſſaſſination of a particular perſon, or as the price of perjury, it will never be contended that *C.* can recover it: it is not ſufficient to ſhew that *B.* ought not to keep the money, but it muſt alſo be ſhewn that *C.* is entitled to receive it. It is to be obſerved that in all the caſes where money paid on illegal contracts has been recovered back, the actions have been brought in diſaffirmance of the contract, as in *Jaques* v. *Withy*, 1 *H. Bl.* 65.; whereas here the action is brought in ſupport of the illegal tranſaction. Neither were the Plaintiffs in thoſe caſes in *pari delicto*, whereas here the Plaintiff was a principal in the fraud. If this money had been paid into the hands of a banker on a general account, it might not have been competent to him to object to the grounds on which that money was paid: but in the preſent caſe the money was paid for the ſpecific purpoſe of completing the illegal contract, and was received in the courſe of carrying it into effect.

Cockell Serjt. *contrà*. This might have been a different caſe if the contract had been executory, for there the Defendant would have ſtood in the ſituation of a ſtake-holder: but here the party who had a right to object to the contract has affirmed it by his own act. Suppoſe money to be paid into the hands of the Plaintiff's clerk, for the Plaintiff's uſe, ſhall he be allowed to ſay "this "money was paid into my hands for your uſe, but being the "conſideration of an illegal contract, I ſhall put it into my own "pocket." The authority of *Tenant* v. *Elliott* is deciſive, and cannot be diſtinguiſhed in principle from this caſe.

EYRE Ch. J. If I could be ſatisfied that the Defendant in this caſe ought to be conſidered as inſuring the performance of an illegal contract, I ſhould be of opinion that a demand neceſſarily connected with an illegal contract, and tending to facilitate the

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execution of it, would be vitiated by that contract; but my doubt is, whether he can be ſo conſidered. The queſtion therefore is, whether the Defendant is competent to ſtate the tranſaction with the party at *Portſmouth*, and make any uſe of it? It ſeems to me that the Plaintiff's demand ariſes ſimply out of the circumſtance of money being put into the Defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *aſſumpſit* in law ariſes, and on that an action on the caſe may be maintained. It was on this ground that the Court proceeded in *Tenant* v. *Elliott*, and I find myſelf under a difficulty in making any diſtinction between that caſe and the preſent. The illicit trading there was as much *malum in ſe* as the tranſaction here. For it was held in the Exchequer-chamber, in *Camden* and others v. *Anderſon* (*a*), that violating a prohibition of a ſpecies of commerce in which the intereſt of the country was concerned, was not merely *malum prohibitum* but *malum in ſe*, and I am well ſatiſfied with that deciſion. Now *Tenant* v. *Elliott* had the ſame foundation as *Camden* and others v. *Anderſon*, *viz.* an inſurance on trade to the *Eaſt Indies* carried on by a ſubject of this country in violation of the *Eaſt India* Company's charter. In *Tenant* v. *Elliott*, the Court were of opinion that though the inſurance was clearly void, yet that the broker into whoſe hands the money was paid had nothing to do with the illegality of the contract. The obligation on him aroſe out of the fact of the money having been received by him for the uſe of a third perſon, which created a promiſe in law to pay; and it was well ſaid by my Brother *Buller*, that even the man who had paid over money to another's uſe could not diſpute the legality of the original conſideration. The caſe therefore is brought to this, that the money is got into the hands of a perſon who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by reſcinding the contract. Though the Court will not ſuffer a party to demand a ſum of money in order to fulfil an illegal contract, yet there is no reaſon why the money in this caſe ſhould not be recovered notwithſtanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the Plaintiff and the man at *Portſmouth*, and in that view I think the verdict is not to be ſupported. However, I incline to a new trial on another ground. It does not clearly appear that the Defendant was not himſelf a party to the original contract, for

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(*a*) *Ante*, 277.

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there was a circumſtance in the report which gave much countenance to the idea that the carrier knew what he was doing, *viz.* that he was lending his aſſiſtance to an infamous traffic. In that caſe the rule *melior eſt conditio poſſidentis* will apply; for if the contract with him be ſtained by any thing illegal, the Plaintiff ſhall not be heard in a court of law.

Buller J. I think the knowledge and participation of the Defendant is not made out by the evidence reported; nor indeed if it had been, would it have made any difference in the caſe of an action for money had and received, which is not founded on the illegal contract, but on a ground totally diſtinct from it; *Walker* v. *Chapman*, cited *Doug.* 471. ed. 3. It ſeems to me that all the confuſion in this caſe has ariſen from the Plaintiff having proved too much at the trial. He ſhould have ſhewn that the Defendant had received ſo much money to his uſe, and it was immaterial whether the money were paid on a legal or an illegal contract. The caſes come up to that point; *Alcinbrook* v. *Hall*, 2 *Wilſ.* 309. which was the caſe of money lent to pay a bet at a horſe-race, and *Faikney* v. *Reynous*, *Burr.* 2069. of money lent to pay differences in a ſtock-jobbing bargain, where the Defendant was privy to the tranſaction. And it has been ſaid that if money be lent to pay differences in the Alley, the party lending it with full knowledge of the purpoſe to which it is to be applied may recover. Here the money having been paid by another to the Plaintiff's uſe, the illegal contract is out of the queſtion. I am unable to diſtinguiſh this caſe from that of *Tenant* v. *Elliott*.

Heath J. I am of the ſame opinion. In *Tenant* v. *Elliott*, the Defendant was employed as agent to negotiate an illegal inſurance, and was privy to the whole tranſaction, and yet the money there was conſidered as coming into his hands, to the uſe of another perſon. I look upon the matter in the ſame light as if the money had been paid into the hands of a banker who could never be allowed to ſay that it was paid in on an illegal conſideration. In the caſe of a ſtake-holder, the Court would inquire into the tranſaction; but the diſtinction is, that whether the conſideration be good or bad, a man may recover his own money, though not that of another perſon. The caſe of *Barjeau* v. *Walmſley*, *Str.* 1249. where a party was allowed to recover (a) money lent to another to game withal, is very ſtrong.

(a) *Vid. etiam, Wettenhall* v. *Wood, coram* Lord *Kenyon, Eſpin. Caſ. N. P.* 22.

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ROOKE J. I agree with my Lord and my Brothers, that there ought to be a new trial in this caſe, though I cannot agree with them in the reaſons on which they are inclined to direct it. The Plaintiff is to recover on his own merits, not on the demerits of the Defendant. If he has no merits, or if he diſcloſes a caſe of foul fraud on his own part, I think he ought not to be heard, however great the demerits of the Defendant may be. The Plaintiff in this caſe is concerned in a traffic not merely forbidden, but fraudulent and indictable: *viz.* the uttering counterfeit tokens, and counterfeit halfpence. He endeavours to carry on this traffic with complete ſecurity to himſelf as to payment. He knows he cannot recover payment as for goods ſold and delivered, and therefore contracts with the Defendants to carry the goods, and to engage to receive the money for them on a commiſſion of 2*d.* in the pound. By theſe means he ſecures himſelf as to the payment, and the Defendants become his agents to ſell for ready money; they are inſtruments of fraud in the hands of the Plaintiff, and being ſuch inſtruments, they behave diſhoneſtly to their principal: ſhall then the Court aſſiſt ſuch a principal to recover his money out of the hands of his agents? or ſhall it not rather ſay, if you will employ agents in a fraudulent tranſaction, you muſt rely on the fidelity of your agents, for the Court will not aſſiſt you? A diſtinction has been taken between the Defendant's being privy to the fraudulent tranſaction, and not being privy to it. I thought at the trial that there was evidence of the Defendants' knowledge, and I told the jury ſo. In that, I probably made ſome miſtake; becauſe neither my own note, nor the memory of counſel, ſupply me with a fact, which yet makes an impreſſion on my memory; *viz.* that ſome of the goods were ill-packed, and the packages broken, ſo that the Defendants muſt probably have known the contents. To clear up this matter, if the Court think the point of law in the Plaintiff's favour (ſuppoſing the Defendants to have no knowledge of the contents of the packages) it may be right to ſend the parties to a new trial. But on the beſt conſideration I can give this caſe, I do not think that this fact, found one way or the other, can vary the ground on which the cauſe ſhould be decided. The ground on which I form my opinion is this; that the Plaintiff ought not to be heard to make a claim in a court of juſtice, founded on a tranſaction for which he ought to be indicted. He diſcloſed the whole tranſaction by his own witneſſes in eſtabliſhing his own caſe, on the 1ſt count, againſt the Defendant for not receiving ready money; and having diſcloſed it, I think the Court ought not to ſhut its eyes againſt it, but to notice the tranſaction as fully as if diſcloſed in a declaration or on a ſpecial verdict. The diſtinction as to the knowledge or ignorance of the Defendant, if allowed, will produce this ſtrange conſequence; that if he be innocent, he ſhall be anſwerable in this action; but if guilty, he ſhall be free: his innocence ſhall work a loſs to him, his guilt ſhall be his indemnity. This is ſo monſtrous a doctrine, that though it may be technically accounted for, on the ground of mutual privity in a foul tranſaction, I cannot aſſent to it, if I can diſcover a principle, by which it may be rejected. I cannot agree that a Plaintiff ſhall be heard, if he alone is party to a foul fraud: and that he ſhall be rejected, only when the Defendant is as bad as himſelf, and when both are mutually concerned in the fraud. I think that a man who has been guilty of an indictable offence ought not to have the aſſiſtance of the law to recover the profits of his crime; and that whether his agents be innocent or criminal, privy or not privy, his claim againſt thoſe agents is equally inadmiſſible in a court of law. In this caſe the Plaintiff does not come into court with clean hands; he alleges his own turpitude, and is indictable for his fraud. Suppoſe a Plaintiff to ſtate in his declaration “I have beaten *A.* according to the “terms of my agreement with *B.*, *B.* has lodged the money he “contracted to give me, in the hands of the Defendant, and the “Defendant refuſes to pay it over to me;” I think the Court would reject his demand. *Tenant* v. *Elliott*, is not preciſely in point; it proceeds on a general principle, to which the circumſtances of that caſe may be applicable: but to which the circumſtances of the preſent caſe form an exception. It is not there ſtated whether the circumſtances which ſupport the objection were proved on the part of the Plaintiff, or on the part of the Defendant. The aſſured did not by that contract ſecure himſelf at all events againſt loſs, though he broke the law by ordering the inſurance in queſtion. Neither the broker nor he could enforce payment from the underwriter: whereas here is a contract to ſecure the Plaintiff againſt loſs in a fraudulent traffic, and the Defendants (whether privy or not to the fraud) are the agents to ſecure him by dealing for ready money only. If the Plaintiff will

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employ an agent in ſuch a tranſaction, he muſt rely on the honeſty of his agent, and I think the law ought not to aſſiſt him.

EYRE Ch. J. If it be poſſible to mix the original tranſaction with the contract on which the action is brought, I agree with my Brother *Rooke* in all his concluſions (*a*).

Rule abſolute for a new trial (*b*).

(*a*) Vid. *Steers* v. *Laſhley*, 6 *T. R.* 61.

(*b*) The Defendants afterwards paid the money into Court.

June 19th.

M'MASTER *v.* KELL.

The Court has no power to diſcharge a Defendant out of execution, on the ground of a commiſſion of bankruptcy having ſince been ſued out againſt him by the Plaintiff.

ADAIR Serjt. on a former day obtained a rule, calling on the Plaintiff to ſhew cauſe why the Defendant ſhould not be diſcharged out of the cuſtody of the warden of the *Fleet*, as to the execution wherewith he ſtood charged at the ſuit of the Plaintiff in this action, on the ground of the Plaintiff having ſince ſued out a commiſſion of bankruptcy againſt him. The facts were theſe. The Defendant was charged in execution by the Plaintiff in *Trinity* term 1797, for 609 *l.*; on the 22d of *May* laſt a commiſſion of bankruptcy iſſued on the petition of the Plaintiff, under which the Defendant was declared a bankrupt; the Plaintiff was the only perſon who proved under the commiſſion, and was choſen ſole aſſignee.

Clayton Serjt. ſhewed cauſe, and contended that a petition to the Great Seal had never yet been held to be a ſatisfaction of a debt, and though in *Burnaby*'s caſe, 1 *Str.* 653. charging a debtor in execution was held ſuch a ſatisfaction to a creditor, as to prevent him from petitioning on that debt, yet that the converſe did by no means follow.

Adair Serjt. in ſupport of the rule, cited *Ex parte Ward*, 1 *Atk.* 153. and *Ex parte Lewes*, 1 *Atk.* 154.

EYRE Ch. J. Suppoſe the Lord Chancellor ſhould think fit to ſuperſede the commiſſion, then we ſhall have diſcharged the debtor, becauſe a commiſſion has iſſued againſt him, and the Lord Chancellor will have ſuperſeded the commiſſion becauſe the party has been charged in execution. There is no inſtance of ſuch an application to a Court of law, and I am not diſpoſed to make a precedent. Indeed I do not know that the principle has ever been recognized as one upon which a Court of law can act; it is much fitter for the Court of Chancery to interfere, ſince that Court may either ſuperſede the commiſſion, or direct the bankrupt to be diſcharged out of cuſtody. I wiſh it to be underſtood that this rule is diſcharged, on the ground of a want of juriſdiction in this Court.

Per Curiam, Rule diſcharged.

Sangster *v.* Birkhead.

June 20th.

If the leſſee of a houſe at a rack-rent underlet it at an advanced rent, he is liable to contribute to the expences of a party-wall, built under the 14 *G.* 3. *c.* 78. nor is the operation of the ſtatute at all varied by any covenants to repair entered into between the landlord and his tenant.

Replevin of goods and chattels.

Avowry for rent in arrear, and iſſue thereupon.

One *Woodward* and his wife being ſeiſed in fee of a houſe in *London*, by leaſe, bearing date 29th of *March* 1777, demiſed it to the Defendant for a term of twenty-one years, which expired at *Lady-day* 1798, at the yearly rent of 44*l.* deducting the land-tax. The Defendant demiſed the houſe for eighteen years and ten months from the 1ſt of *May* 1779 to one *Robert Sugden* at the yearly rent of 60*l.*, alſo deducting the land-tax. In this leaſe amongſt the other uſual covenants on the part of the leſſee, there was one to make "all needful and neceſſary reparations and "amendments whatſoever," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the leſſee to inſure. The leaſe was aſſigned by *Sugden* for a valuable conſideration, and after ſeveral meſne aſſignments came on 19th of *May* 1787 to the preſent Plaintiff; in *May* 1795 a fire having happened in the adjoining houſe, by which that houſe was entirely conſumed, and the roof of the Plaintiff's injured, the owners of the ſcite of the adjoining houſe being deſirous to rebuild, had the party-wall examined by four ſurveyors, and delivered a certificate to the Plaintiff according to 14 *Geo.* 3. *c.* 78. *ſ.* 38. that the wall was, by the opinion of the ſaid ſurveyors, condemned as decayed and ruinous. It was accordingly rebuilt and the Plaintiff called upon for a moiety of the expence. This he paid, and deducted out of the rent due to the Defendant, who diſtrained for rent in arrear to that amount.

This cauſe came on to be tried before *Rooke* J. at the *Guildhall* ſittings after *Eaſter* term, when the ſurveyors gave in evidence, that they had condemned the wall as ruinous and decayed; that it was probably built ſoon after the fire of *London*; that they could not decide whether it were originally ill-built, or had received ſome injury from external violence, *but that it was not injured*

injured by fire. A verdict was taken for the Defendant in order to aſcertain the ſum due, ſubject to the opinion of the Court.

Adair Serjt. having on a former day obtained a rule *niſi* for ſetting aſide that verdict and entering one for the Plaintiff,

Shepherd Serjt now ſhewed cauſe. The firſt queſtion is, whether the Defendant can be conſidered as the owner of the improved rent within the 14 *Geo.* 3. *c.* 78. *ſ.* 41. (*a*)? the ſecond, whether under the terms of the leaſe the Plaintiff was not bound to repair the wall at his own expence, or whether he is relieved from the performance of his covenant by 14 *Geo.* 3. *c.* 78.? Firſt, the object of the act was to throw the burden on thoſe perſons who derive a benefit from the improved rent; ſuch as the leſſee of a ground rent on a building leaſe: it was never intended to apply to perſons who having taken a leaſe at a rack-rent, afterwards underlet at a rent ſomewhat higher. The Defendant is not the owner of the improved rent, but of an increaſed rent only. It ſeems to have been the opinion of Lord *Kenyon* and *Buller* J. in *Southall* v. *Leadbetter*, 3 *T. R.* 458., that perſons who take leaſes at a ſmall rent, and afterwards improve them ſo as to create a new eſtate ſhould be liable. But a perſon who takes a houſe in the city of *London* at a rack-rent, and afterwards underlets to one who wants to come into his buſineſs, and therefore gives a better rent for the houſe, is not the owner of the improved rent within the meaning of the act; if he were, there might be ſix different owners of the improved rent of the ſame houſe. In *Peck* v. *Wood*, 5 *T. R.* 130. the diſtinction taken, was between the improved rent and the ground rent. Secondly, ſuppoſing the Defendant to be the owner of the improved rent within 14 *Geo.* 3. *c.* 78. ſtill the Plaintiff is bound by his covenant to repair, and is not exempted from the performance of thoſe covenants by the act. [The *Court* ſaid they could not meddle with that queſtion, as the Legiſlature certainly never meant to incumber itſelf with the covenants which parties might make with each other.]

Adair contra was ſtopped by,

(*a*) By 14 *Geo.* 3. *c.* 78. *ſ.* 41. It is enacted, that the perſon at whoſe expence any party-wall ſhall be built, agreeably to the directions of that act, ſhall be reimburſed by the owner or owners who ſhall be entitled to the improved rent of the adjoining building in the proportion therein mentioned. That the firſt builder ſhall leave at the adjoining building an account of the ſum to be paid by ſuch owner: whereupon it ſhall be lawful for the tenant or occupier of ſuch adjoining building to pay ſuch proportionable part of the expence to the firſt builder, and to deduct the ſame out of the rent which ſhall become due from him to ſuch owner or owners under whom he holds, until he be reimburſed the ſame.

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Sangster *v.* Birkhead.

Eyre Ch. J. I dare ſay that the leading object of the Legiſlature was to make the owner of the improved rent liable, as oppoſed to the ground landlord. But though that may have been the leading object, yet the expreſſions of the act being ſuch as they are, we muſt deal with them as well as we can, and find an owner of the improved rent in all caſes, though there ſhould be no ground rent reſerved. Here the original landlord made a leaſe for twenty-one years to a perſon who again underlet the premiſes. Who then is the perſon to be conſidered as the owner of the improved rent, but the man who on all the ſubſiſting leaſes has the beſt rent? But, whether he be the perſon or not, I have much doubt, as the queſtion now ſtands, if the Defendant can avail himſelf of the objection which he has taken. I think that it was intended by the Legiſlature that the tenant ſhould pay a moiety of the expence to the perſon building the wall, and reimburſe himſelf by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on ſuch other perſons as he may think liable. That appears to me the beſt conſtruction for putting the buſineſs in a practicable ſhape. I ſhould incline to that opinion, even if it were made out that the covenant on the part of the tenant to repair, included this caſe: for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages ſhould be ſettled in an action of covenant, than to break in on the rules eſtabliſhed by the ſtatute. It is eaſy to ſee, that this is an ill-penned law, and its meaning is left uncertain; but in the preſent caſe I do not know how to determine, who is the owner of the improved rent, if it be not the perſon who takes the beſt rent. Poſſibly it may be ſaid that *Woodward* and the Defendant ſhould pay in certain proportions; let them however ſettle that in ſuch actions as they may think fit to bring. I know no way of executing this law, if we enter into all the derivative claims of different landlords. If the tenant pays the money, let him reimburſe himſelf, and leave the other parties to diſpute among themſelves.

Buller J. I agree in opinion with my Lord, and think his conſtruction of the act clear and intelligible. There are three parties in this buſineſs, the man who built the wall, the tenant, and the tenant's immediate landlord. The owner of the adjoining houſe purſued the directions of 14 *Geo.* 3. *c.* 78. which gave him a right to call on the Plaintiff for a moiety of the expence; that being ſettled, how does the caſe ſtand between the tenant and his landlord? I ageee that we muſt conſider whether the landlord be the owner of an improved rent: but in this caſe he has an improved rent, ſince he receives more than the perſon of whom he took the premiſes. And if the landlord has the improved rent he certainly is liable, though there be only one year of the term to come. As to the queſtion, whether the expence can be apportioned, that does not ariſe here; but if any thing could be found to warrant an opinion thrown out by Lord *Manſfield* in *Stone* v. *Greenwell* (a), that the parties might be liable to a rateable proportion in ſome caſes, it would tend much to the advancement of juſtice. The building a party-wall is certainly a great improvement to the premiſes, and every perſon intereſted in the fee and receiving a benefit from it ought to contribute.

HEATH J. I think the conſtruction which has been put upon this ſtatute is the true and neceſſary conſtruction. The Legiſlature ſeems to think that there muſt be an owner of an improved rent in reſpect of every houſe; and we need not look further than the landlord immediately above the tenant who pays.

ROOKE J. I do not know how any other conſtruction can be put upon this act, than that which has been ſuggeſted. The words of the ſtatute are, that "it ſhall be lawful for the tenant or occupier of ſuch adjoining building or ground to pay one moiety, "&c.;" this Plaintiff was the tenant, it was therefore lawful for him to pay, and he was to reimburſe himſelf by deducting the rent due from him to his landlord, if that landlord was the owner of the improved rent; but not if he was only the owner of the ground rent.

Rule abſolute.

(a) *Mich. T.* 24 *Geo.* 3. *B. R.* referred to 3 *T. R.* 461.

June 20th.

WALKER v. CONSTABLE.

A ſale of lands, though by auction, is within the ſtatute of frauds. If the abandonment of a contract be made the ground of an action, it is not competent to the Plaintiff to ſhew that a contract has exiſted and been abandoned, without proving the ſpecific contract. The net ſum only, without intereſt, can be recovered in an action for money had and received.

THIS was an action on the caſe. The firſt count in the declaration ſtated that the Plaintiff had contracted with the Defendant for the purchaſe of an eſtate, had paid a depoſit of 860 *l.*, and had incurred a conſiderable expence in examining the title; that in conſideration of the premiſes, and that the Plaintiff and Defendant had agreed that the ſaid contract ſhould be at an end, and the ſaid intended purchaſe be abandoned, and that the Plaintiff would receive back his aforeſaid purchaſe money, the Defendant undertook to pay intereſt on the depoſit money from the time of its being advanced to the time of its being repaid, and alſo the coſts and expences of examining the title. There was alſo a count for money had and received.

Plea general iſſue.

At the trial of this caſe before *Eyre* Ch. J., at the *Guildhall* ſittings after *Eaſter* term, the Plaintiff not having produced a written contract in ſupport of his declaration was nonſuited, on the ground of its being a contract for the ſale of lands within the ſtatute of frauds (*a*).

Adair Serjt. on a former day obtained a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a verdict be entered for the Plaintiff, contending, firſt, that ſales by auctions were not within the ſtatute [But the *Court* ſaid that the caſes (*b*) on that ſubject only applied to ſales of chattels]; ſecondly, that it was competent to the Plaintiff to prove that a contract had exiſted and been abandoned, without producing the ſpecific contract in evidence.

The Court, however, were of opinion that the contract itſelf muſt be ſhewn, before it could be proved to have been abandoned: but granted a rule to ſhew cauſe on the ſuggeſtion of

BULLER J. that the Plaintiff might perhaps be entitled to recover intereſt under the count for money had and received.

Adair having again mentioned the caſe this day,

The Court were of opinion, on the authority of *Moſes* v. *Macferlan*, 2 *Burr.* 1005. that in an action for money had and received the Plaintiff could recover nothing but the net ſum received without intereſt.

Per Curiam, Rule diſcharged.

(*a*) 29 *Car.* 2. *c.* 3. *ſ.* 4.

(*b*) Vid. *Simon* v. *Metivier* or *Motivos*, 1 *Bl.* 599. 3 *Burr.* 1921. and *Stansfield* v. *Johnson*, *coram Eyre* Ch. J. *Eſp. Caſ. N. P.* 101.

STEEL *v.* RORKE Adminiſtratrix, &c.

June 21ſt.

An outſtanding judgment againſt a teſtator or inteſtate, not docketted according to the directions of 4 & 5 *W.* & *M.* *c.* 20. cannot be pleaded by an executor or adminiſtrator to an action on ſimple contract.

ASSUMPSIT for goods ſold and delivered to the Defendant's inteſtate. Plea: Judgments and bonds outſtanding. Replication: That the judgments were not at the time of ſuing out the writ docketted and entered according to the proviſions of 4 & 5 *W.* & *M.* *c.* 20. Rejoinder: "Proteſting that the ſaid Replication, and the matters therein contained, are not ſufficient in "law for the Plaintiff to have or maintain his action thereof "againſt the Defendant, nevertheleſs that the Defendant before "and at the time ſhe ſo pleaded her ſaid plea as aforeſaid, had "notice of the records of the ſaid ſeveral judgments ſo obtained "as aforeſaid, and each and every of them in the ſaid replication "mentioned, being in the ſaid court of our ſaid Lord the King, "before the King himſelf, in manner and form as ſhe the Defendant hath above in thoſe reſpects in pleading alleged, and "which ſtill remain, and each and every of them remains in the "ſaid court of our ſaid Lord the King, before the King himſelf, "at *Weſtminſter* aforeſaid, in their and each of their full force and "effect, not reverſed, annulled, ſet aſide, or in anywiſe paid off "or ſatisfied." To this there was a general demurrer and joinder therein.

Heywood Serjt. in ſupport of the demurrer. The caſe of *Hickey* v. *Hayter* adminiſtratrix, 6 *T. R.* 384. which puts judgments not docketted on a footing with ſimple contract debts, is deciſive in favour of the Plaintiff. The only argument which can be advanced in ſupport of this rejoinder is, that the object of the ſtatute was to inſure notice to executors and adminiſtrators of judgments in force againſt them; if therefore that notice be obtained by any other means it will be ſufficient. The words of the ſtatute however are poſitive "that no judgment not docketted and entered ſhall have any preference againſt heirs, executors, and adminiſtrators, in the ad- "miniſtration of their anceſtors', teſtators', or inteſtates' effects." The plea ſtates that the Defendant is bound to pay debts which he is not bound to pay; for there is no lien on the effects created by the judgments; the executor, therefore, cannot take advantage of them as if there had been. Beſides, the docketting is not required for the ſake of executors and adminiſtrators only, but of all perſons, ſuch as the creditors or reſiduary legatee who may be intereſted in knowing what judgments there may be outſtanding againſt the eſtate.

Shepherd Serjt. *contrà*. Before the ſtatute, executors and adminiſtrators were bound to retain aſſets in their hands for the payment of all outſtanding judgments, though they had received no notice of any being ſigned; for it was their duty to ſearch for them. The only object of the ſtatute, as appears by the preamble (*a*) was to remedy the difficulty which they lay under in diſcovering ſuch judgments. The Legiſlature, therefore, after directing the form in which the docket and entry ſhall be made, enacts that executors and adminiſtrators ſhall not be bound to take notice of any judgments unleſs docketted and entered accordingly. But in this caſe the only queſtion is, whether the adminiſtratrix having received actual notice of the judgments, is not bound to give them a priority. Lord *Kenyon*, in *Hickey* v. *Hayter*, ſays, that if the Defendant had had notice of the judgment debt, perhaps ſhe would have been warranted in paying it before the bond debts. The words of the ſtatute only ſay that ſuch judgments ſhall not have any *preference* againſt executors and adminiſtrators; but if they receive actual notice, ſurely they may be at liberty to ſet it up. At any rate as this is the firſt time that the queſtion has ariſen, and the Defendant in her plea has ſtated more outſtanding ſpecialty debts than the aſſets will pay, the Court will allow her to amend by ſtriking out the judgments which are not docketted.

EYRE Ch. J. I think on principle that the rejoinder is bad; but I have no objection to allowing the Defendant to amend. The ſtatute declares that judgments not docketted ſhall have no preference againſt heirs, executors, and adminiſtrators. Why are executors and adminiſtrators allowed to plead outſtanding judgments? Becauſe they have a preference, and it is for that reaſon that they are allowed to plead them, in order to prevent a *devaſtavit*. But it is ſaid that an executor is at liberty to ſet up judgments not docketted. Certainly he may pay them, and when he has paid them, they are like other ſimple contract debts, which when paid may be given in evidence under the title of *plenè adminiſtravit*. But if the law has allowed executors and adminiſtrators to plead debts of a ſuperior nature to debts of an inferior nature, only becauſe they are bound to pay them; when the law has ſaid that certain debts ſhall not be debts of a ſuperior nature, unleſs certain ceremonies are obſerved, they will no longer ſtand in that claſs, and there is no reaſon why they ſhould be ſet up againſt a demand on ſimple contract. The caſe is too clear to admit of a queſtion.

(*a*) Whereas great miſchiefs happen and come as well to perſons in their life-times, but more often to their heirs, executors, and adminiſtrators, and alſo to purchaſers and mortgagees, by judgments entered upon record in their Majeſties courts at *Weſtminſter* againſt the perſons Defendants, by reaſon of the difficulty there is in finding out ſuch judgments, *&c.*

BULLER J. My brother *Heywood* ſtated the ſubſtance of a plea of outſtanding debts very accurately: it is this, "I the Defendant am bound to pay other debts before I pay you the Plaintiff;" and the only queſtion is, whether he be bound to pay or not? But no man ever heard of a plea in an action on ſimple contract, ſtating that the teſtator owed ſo much more on ſimple contract, and therefore the Defendant meant to give a preference to others before he paid the Plaintiff. If then the Defendant was not *bound* to prefer, the rejoinder is bad. My Brother *Shepherd* ſeems to conſider the ſtatute in a more limited way than the words will bear. The object of the Legiſlature was more general. The preamble ſtates that miſchiefs happen as well to perſons in their lifetimes, but more often to their heirs, executors, and adminiſtrators, and alſo to purchaſers and mortgagees. This caſe is clear on the words of the ſtatute, and the deciſion in the King's Bench is directly in point. Mr. J. *Groſe* and Mr. J. *Lawrence* were there of opinion that the ſituation of judgments not docketted was reduced to that of ſimple contract debts, and I agree with Lord *Kenyon* that no notice is ſufficient but that which the ſtatute has required.

HEATH J. I am of the ſame opinion. The object of the ſtatute was not only to protect executors and adminiſtrators, but alſo creditors: for there cannot be a greater inſtrument of fraud than a judgment not docketted. If a party means to act honeſtly he ſhould follow the directions of the act.

ROOKE J. I am of the ſame opinion.

Leave given to ſtrike out ſuch part of the plea as relates to the judgment in queſtion, and to ſtate what is really due on the bonds, but not on the penalties.

June 21ſt.

TINGREY, Widow, *v.* BROWN.

The adminiſtratrix of an executor cannot ſue for the double value of lands held over after notice to quit under a demiſe from the teſtator, contrary to 4 G. 2. *c.* 28. without taking out adminiſtration *de bonis non*; even though the tenant has attorned to her.

DEBT for double the yearly value of lands held over contrary to 4 *G.* 2. *c.* 28. The firſt count of the declaration ſtated a demiſe by one *Judith Tingrey* (who was poſſeſſed for a long term of years) to the Defendant, of the premiſes in queſtion, for twenty-one years; that ſhe died, having by her will made *Francis Tingrey* her ſole executor, who proved the will, and took execution upon himſelf, "by reaſon whereof he the ſaid *Francis* then and there "became entitled to the ſaid demiſed premiſes, ſubject to the ſaid "leaſe;" that he died inteſtate, and that the Plaintiff took out adminiſtration of his effects, "by virtue whereof ſhe became and "was and is entitled to the ſaid remainder of the ſaid demiſed "premiſes for the ſaid term, which is yet unexpired, and ſo de-"miſed to the Defendant as is aforeſaid; of all which premiſes "the Defendant afterwards (to wit) on, *&c.* at, *&c.* had notice, "and then and there attorned to and became the tenant to the "Plaintiff for the reſidue of the ſaid term." It then ſtated that after the expiration of the Defendant's term, and notice in writing to quit, he continued to keep poſſeſſion, whereby, *&c.*

To this count there was a general demurrer and joinder.

Williams Serjt. was to have argued in ſupport of the demurrer, but *Le Blanc* Serjt. being called upon by the Court to begin on the part of the Plaintiff, contended that as this was not a debt due to the teſtator, it was not neceſſary for the Plaintiff to clothe herſelf with the character of adminiſtratrix *de bonis non.* That it did not appear but that all the debts had been ſatisfied by *Francis Tingrey*, in which caſe this leaſe would have paſſed to his perſonal repreſentative the Plaintiff. He obſerved alſo that the Defendant admitted by the demurrer that he had attorned to the Plaintiff, and therefore as this ſtatute ſays that the landlord ſhall bring the action, that landlord muſt be the perſon to whom the tenant has attorned.

Eyre Ch. J. Is not every thing unadminiſtered which has not been reduced into the actual poſſeſſion of the executor, and converted by him? Moſt certainly in any caſe in which the Plaintiff means to make title, ſhe muſt take out adminiſtration *de bonis non.* It is not incumbent on thoſe who reſiſt, to ſhew that there are debts of the teſtator unſatisfied, but the Plaintiff muſt ſhew that there are no debts, and that the executor poſſeſſed himſelf abſolutely in his own right.

Per Curiam, Judgment for the Defendant.

Knowlys and Another *v.* Reading.

June 27th.

The Defendant was arreſted by original in the King's Bench; but before declaration was removed by *habeas corpus* to the Fleet, and a declaration in the Common Pleas was delivered.

If a Defendant be arreſted by proceſs of K. B., and removed by *habeas corpus* to C. B., he may put in and juſtify bail in either Court.

After

1798.

Knowlys v. Reading.

After which the Plaintiff's attorney received a notice of bail being put in, and of their intention to juſtify on the 26th in the King's Bench; but on the 25th he received another notice of bail being put in in this Court, and of an intended juſtification here on this day.

Runnington Serjt. now oppoſed the juſtification, and urged that the bail ought to be put in in the King's Bench, as there was no writ in this Court; and contended that if they were received here and an action were brought on the bail-bond, the Defendant could not plead *comperuit ad diem*.

But the *Court* were of opinion, that as the Plaintiff was at liberty to declare in either Court, if bail were offered they here ought to be received.

Bail allowed.

TRINITY TERM 38 Geo. 3.

It is Ordered, that upon all Writs of *Diſtringas* returnable on the laſt day of Term, the Plaintiff ſhall be at liberty at the riſing of the Court, to move to increaſe Iſſues on the *alias* or *pluries Diſtringas*, to be iſſued thereupon on the following day, in caſe no appearance ſhall have then been entered. And alſo that in like Caſes where a *Diſtringas* ſhall be returnable on the laſt day of Term and Iſſues thereupon levied, the Plaintiff ſhall be at liberty, at the riſing of the Court, to move for leave to ſell ſuch Iſſues to pay the Coſts of ſuch *Diſtringas* or *Diſtringas's*. And it is further Ordered, that where a rule to bring in the Body ſhall expire on the laſt day of Term, the Plaintiff ſhall alſo be at liberty at the riſing of the Court on that day, to move for an *Attachment* for not bringing into Court the Body of the Defendant, and that ſuch *Attachment* may be accordingly iſſued on the following day, provided Bail ſhall not then be perfected, or the Defendant rendered in diſcharge thereof.

Jas. Eyre.
F. Buller.
J. Heath.
G. Rooke.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

DRISCOL *v.* BOVIL.

Nov. 9th.

THIS was an action on a policy of inſurance on three fourths of the ſhip *Timandra*, from *Liſbon* to *Madeira*, from *Madeira* to *Saffi*, and from *Saffi* to *Liſbon*; being the inſurance on the *round* voyage mentioned in the caſe of *Driſcol* v. *Paſſmore*, *ante*, p. 201.

At the trial before *Eyre* Ch. J. at the *Guildhall* ſittings after *Trinity* term, the ſame facts appeared in evidence as in *Driſcol* v. *Paſſmore*, with the addition of a letter written by the Plaintiff on the 18th of *Auguſt* from *Liſbon*, (after his return from *Madeira* to that place,) to his broker in *London*; which contained the following paſſage: "Should the merchant here, who chartered the " veſſel, inſiſt on her proceeding to *Saffi* to fulfil the charter, I " want to know if it is agreeable to the underwriters that the " veſſel may proceed to complete her voyage, as by recent ac" counts the riſk is not ſo great. I expect your immediate an-

Inſurance on a voyage from *A.* to *B.*, from *B.* to *C.*, and from *C.* to *A.* The voyage from *A.* to *B.* is performed, but that from *B.* to *C.* being unavoidably prevented, the ſhip returns to *A.*; from whence the captain writes to his broker in *London*, requeſting him to obtain the opinion of the underwriters as to his proceeding directly to *C.* if the charterer ſhould inſiſt upon it; and is anſwered by him that *he* thinks the policy at an end. At the inſtance of the charterer the captain does proceed to *C.*, and on his return from thence to *A.* the ſhip is captured. Held that the voyage inſured was never abandoned.

1798.

Driscol v. Bovil.

" ſwer reſpecting their determination on this buſineſs. I hope " they will be ſatisfied that the return of the veſſel to this port is " much more in favour of them, than of me or any other perſon " concerned. By the next packet that ſails from hence I ſhall be " able to inform you whether ſhe is to proceed to *Saffi* or not; " but the opinion of the underwriters either one way or the other " is neceſſary." The broker in his anſwer to this letter gave his opinion that the policy on the round voyage was at an end, and informed the Plaintiff that he had effected a new policy on the voyage from *Saffi* to *Liſbon*. A verdict was found for the Plaintiff.

Le Blanc Serjt. on this day moved for a rule to ſhew cauſe why a new trial ſhould not be had, and contended that although the deviation made by returning to *Liſbon* might poſſibly be juſtified by neceſſity (*a*), ſtill that it appeared by the Plaintiff's letter that the original object of the voyage had not been kept conſtantly in view: for it long depended on the will of the charterer whether the veſſel ſhould proceed or not; and that the Plaintiff himſelf was manifeſtly deſirous of abandoning the voyage.

Buller J. This certainly is not a verdict againſt law. The queſtion before us is a mere queſtion of fact. This motion ſeems to have been made on two grounds; firſt, that the deviation was not juſtified by neceſſity, though little reliance has been placed on that; ſecondly, that the voyage inſured was abandoned. Now whether the deviation were juſtified by neceſſity or not, reſts on one plain fact; namely, that on receipt of the intelligence of ſome *Mooriſh* cruiſers being off *Saffi*, the crew refuſed to proceed. What then could the captain do but return? As to the abandonment of the voyage, it ſeems to me that the Plaintiff has acted with great prudence and circumſpection, but that he has never abandoned. The terms of his letter expreſsly prove that he had not formed any concluſion as to what he ſhould do, and that he did not think himſelf at liberty to form one. He aſks the broker, what the underwriters will ſay, if the merchant ſhall ſtill inſiſt on his completing the voyage. Does he then determine to proceed at any hazard? On the contrary he wiſhes to know the ſentiments of the underwriters, and reſerves to himſelf the power of determining what part he ſhall take. I think the verdict clearly right.

(*a*) Vid. *Lavabre* v. *Wilſon*, *Doug.* 290. 3d ed. where Lord *Mansfield* ſays "that it "is incumbent on the inſured to purſue a "voyage of neceſſity directly, in the ſhorteſt "and moſt expeditious manner."

Heath J. I am of the ſame opinion. As to the neceſſity of the deviation there can be no doubt. And with reſpect to the laſt point, if the Plaintiff intended to abandon, that intention ſhould have appeared in clear terms, or in unambiguous conduct. He ſeems to have taken all neceſſary caution, firſt by conſulting the charterer and then the inſurer, but it does not appear that he ever came to the determination of abandoning the voyage.

Rooke J. I cannot diſtinguiſh between this caſe and that of *Driſcol* v. *Paſſmore*; and though I at firſt entertained ſome doubts on the latter, I am now perfectly ſatisfied that the deciſion was right. The letter given in evidence in this caſe does not prove any intention in the Plaintiff to abandon; for it appears that he conſidered himſelf liable to continue the voyage, provided the charterer ſhould inſiſt upon it.

Le Blanc took nothing by his motion.

Hill and Another *v.* Secretan.

Nov. 9th.

A. being indebted to *B.* without any order from him conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C.*; reſolved that *B.* had an inſurable intereſt in the goods ſo conſigned.

Action on a policy of inſurance on goods on board the *San Bernardo* from *St. Andero* to *London*. The declaration averred that the Plaintiffs were intereſted to the amount inſured.

At the trial before *Eyre* Ch. J. at the *Guildhall* ſittings after *Trinity* term, it was proved that the houſe of *De la Torrè* in *Spain* conſigned 29 bags of wool to the houſe of *Dubois* and Son in *London*, and indorſed the bill of lading to them; but that with the bill of lading came a letter annexed, directing *Dubois* and Son to hold 15 bags for a houſe at *Halifax* and the remainder for the Plaintiffs at *Exeter*, which was the ſubject of the preſent inſurance. It appeared alſo that *De la Torrè* was indebted to the Plaintiffs in the ſum of 500 *l.*, but that they had given no orders for theſe goods. The ſhip was captured by the *French*, but afterwards retaken. The jury found a verdict for the Plaintiffs.

Shepherd Serjt. now moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial be had, inſiſting that the Plaintiffs had no inſurable intereſt in the goods as the bill of lading was not indorſed to them, and as *De la Torrè* would ſtill be liable for his debt to the Plaintiffs, if the goods ſhould not reach them.

But the Court were clearly of opinion that as the goods were conſigned to *Dubois* and Son to hold for the Plaintiffs, the former

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were to be conſidered as truſtees for the latter from the time the goods were put on board the ſhip; that the circumſtance of the Plaintiffs being creditors of *De la Torrè* raiſed a good conſideration for the conſignment, and therefore no doubt could be entertained of the Plaintiffs having an inſurable intereſt (*a*).

Shepherd took nothing by his motion.

(*a*) Lord *Kenyon*, in the caſe of *Anderſon* v. *Edie*, *Guildhall* ſittings, *Trinity* term 35 *Geo.* 3. *Park. Inſur.* 432. *a.* was of opinion that a creditor has an inſurable intereſt in the life of his debtor, ſince the means by which he is to be ſatisfied may materially depend upon it, and at all events the death muſt in ſome degree leſſen the ſecurity.

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A. having conſigned a cargo to *B.* and drawn bills on him to the amount of it, in favour of *C.* his general agent, ſends theſe bills together with the bills of lading to *C.*, deſiring him to tranſmit them to *B.*, "that *B.* may have an opportunity of inſuring:" he alſo draws a bill for 300 *l.* on *C.*, which is accepted; *B.* refuſes to take to the cargo or accept the bills drawn on him: *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct. In an action by *C.* ſtating himſelf in the firſt count to be the agent of *A.* and averring intereſt in him; in the ſecond averring intereſt in himſelf: held, firſt, that the policy was good within 28 *G.* 3. *c.* 56.; ſecondly, that *C.* had an inſurable intereſt to the amount of 300 *l.*

THIS was an action upon the caſe on a policy of inſurance, dated the 9th of *January* 1797, and made by the Plaintiffs by their names and firm of Meſſrs. *Wolffs* and *Dorville*, as well in their own names as for and in the name and names of all and every other perſon or perſons to whom the ſame did, might, or ſhould appertain in part or in all, upon goods on board the ſhip *The Fahrſund's Wharf*, *Peter Nicolay Mohr*, Maſter, at and from *Fahrſund* to *London*, at a premium of ſix guineas *per cent.* The Defendant underwrote the policy for 200 *l.*, there was a total loſs by perils of the ſea. The firſt count of the declaration averred that the inſurance was made by the Plaintiffs as the agents of one *Jochum Brink Lund*, and for his uſe and benefit, and that the Plaintiffs at the time of making thereof were perſons reſiding in *Great Britain*, and did effect the policy as ſuch agents, and that the ſtyle and firm of Meſſrs. *Wolffs* and *Dorville* inſerted in the policy was at the time of making thereof the uſual ſtyle and firm of dealing of them the Plaintiffs, and that *Jochum Brink Lund* was intereſted in the goods to the amount inſured. The ſecond count averred the intereſt in the goods to be in the Plaintiffs, and that they made the ſaid inſurance for and on their own account.

The Defendant paid the premium viz. 12 *l.* 12 *s.* into Court upon a plea of tender, which was admitted.

The cauſe was tried at the *Guildhall* ſittings after *Michaelmas* term laſt, before *Eyre*, Ch. J. when a verdict was found for the Plaintiffs with 187 *l.* 8 *s.* damages, and 40 *s.* coſts, ſubject to the opinion of the Court on a caſe, ſtating, That *Jochum Brink Lund* was a merchant reſident at *Fahrſund* in *Norway*, and had contracted with certain perſons in *London*, carrying on trade under the firm of the *Cudbear* Company, to ſupply them with a quantity of moſs: that the Plaintiffs were the general agents of the ſaid *Jochum Brink Lund* in *London*: that the ſaid *Jochum Brink Lund* having, on the 12th of *November* 1796, ſhipped 574 ſacks of moſs at *Fahrſund* in *Norway*, on board the ſaid ſhip called the *Fahrſund's Wharf*, conſigned to the ſaid *Cudbear* Company in *London*, and upon their account and riſk, tranſmitted to the Plaintiffs the invoice and bill of lading of the ſame, in a letter as follows: "The ſhip *Fahrſund's Wharf* is now loading with a cargo of "moſs; ſhe will be ready to ſail in the courſe of eight or fourteen "days, and uſually takes in fifty-ſix tons; pleaſe to hand the in"cloſed to the *Cudbear* Company, that theſe friends may have an "opportunity to ſecure themſelves by inſuring the moſs cargo, "the ſeaſon being ſo far advanced:" that the goods were by the ſaid bill of lading to be delivered to the ſaid *Cudbear* Company or order; that on the 10th of *December* 1796 the ſaid *Jochum Brink Lund* drew a bill of exchange on the ſaid *Cudbear* Company for the amount of the ſaid cargo, 1112 *l.* 8 *s.* 2 *d.*, at three months ſight, in favour of the Plaintiffs, and remitted the ſame to the Plaintiffs to procure acceptance thereof, and to place to his credit; and at the ſame time adviſed the Plaintiffs of his having drawn on them for 300 *l.*, which bill for 300 *l.* was by the Plaintiffs accepted and afterwards paid: that the *Cudbear* Company, after having received through the hands of the Plaintiffs the bill of lading and invoice of the ſaid cargo, and having the ſaid bill for 1112 *l.* 8 *s.* 2 *d.* preſented to them by the Plaintiffs for acceptance on the 9th of *January* 1797, refuſed to accept the ſaid bill or take to the cargo, or inſure the ſame, and returned the bill of lading and invoice to the Plaintiffs: that the Plaintiffs thereupon cauſed the above inſurance to be made on the ſaid 9th of *January* 1797 without any order ſo to do, and on the next day by letter informed their correſpondent *Jochum Brink Lund*, that the *Cudbear* Company had refuſed to accept the bill or take to the cargo, or make any inſurance, and that they the Plaintiffs had made ſuch inſurance as aforeſaid. On receipt of which letter the ſaid *Jochum Brink Lund*, on the 28th day of *Jannary* 1797, wrote a letter to the Plaintiffs, containing, among other things, as follows: "It is very well you have taken the precaution to inſure the moſs "cargo,

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"cargo, hoping the *Cudbear* Company at the arrival of the ſhip "will repay the premium; in the mean time I have credited you "the amount of it in your account. On the 10th inſtant Captain "*P. N. Mohr* ſailed again, but on account of ſtormy and contrary winds was obliged to take harbour on the weſt coaſt of "*Norway* in *Raſvog*, without any damage, intending with the "firſt fair wind to proceed on his voyage; not doubting at his "ſafe arrival you will ſettle it with the *Cudbear* Company in ſuch "a manner that they, without any further objection, will take and "pay the cargo as *per* invoice. In want of complying with the "above I ſhall be neceſſitated to commence a law-ſuit againſt the "ſaid company, to which I will furniſh you with the neceſſary "documents." That the ſaid *Jochum Brink Lund* was at the time of the ſaid inſurance being effected indebted to the Plaintiffs in 1400*l.* and upwards: that the ſaid ſhip the *Fahrſund's Wharf*, with the ſaid cargo on board, was afterwards loſt by perils of the ſea in the voyage inſured from *Fahrſund* in *Norway* to *London*.

The queſtion reſerved for the opinion of the Court was, whether the Plaintiffs were entitled to recover? if not, a verdict to be entered for the Defendant.

Le Blanc Serjt. for the Plaintiffs. Two objections are made to the Plaintiff's recovery. To the firſt count which avers the intereſt to be in *Lund*, and that the Plaintiffs made the inſurance as his agents and for his uſe and benefit, and that at the time of making it they reſided in *Great Britain* and effected the policy as ſuch agents, the Defendant objects that the policy was not made by the order of *Lund*, nor by the Plaintiffs as his agents, and therefore is void under 28 *Geo.* 3. *c.* 56. To the ſecond count, which avers the intereſt to be in the Plaintiffs, he objects that they had no inſurable intereſt, or, what is ſtronger, that they made the inſurance on *Lund*'s account, and not on their own. 1ſt, It appears that the Plaintiffs were the general agents of *Lund* in this country, it was therefore their duty to take care of his intereſt. No expreſs order was given to the Plaintiffs by *Lund* to inſure on his account, becauſe he thought that the conſignees, the *Cudbear* Company, would take to the cargo and inſure. This appears by his letter, in which he directs the bill of lading to be handed to the *Cudbear* Company, that they may have an opportunity of ſecuring themſelves by inſurance. On the *Cudbear* Company refuſing to take to the cargo, the Plaintiffs inſured for *Lund* their principal, and immediately wrote him word of their having ſo done: *Lund* directly approved of their conduct, and adopted their acts. Previous to 25 *Geo.* 3. *c.* 44. it was complained of as a great inconvenience that policies being made in blank, no name appeared by which any judgment could be formed of the character of the perſons intereſted in the riſk. By that ſtatute it was therefore enacted, that no policy ſhould be made without inſerting the name or names of the perſon or perſons intereſted therein, or the name or names of the perſon or perſons who ſhould effect the ſame as agent or agents of the perſon or perſons intereſted, *&c.* After this act, many policies were effected in the names of agents, without its being ſtated that they acted as agents, and great inconvenience having ariſen from this circumſtance, it was found expedient to repeal that ſtatute by 28 *Geo.* 3. *c.* 56. the object of which is, that the name of ſome perſon reſiding in *Great Britain* ſhall appear on the policy, without requiring that he ſhall be deſcribed as agent. Then do not the Plaintiffs come within the meaning of this act? They are perſons reſiding in *Great Britain*; they are the general agents of the perſon intereſted; they are the perſons to whom the conſignees returned the bill of lading; they are the perſons to whom the owner of the cargo intimated the propriety of making an inſurance, and whoſe acts in having inſured he afterwards approved. The 28 *Geo.* 3. having been made in order to remove the inconveniences occaſioned by 25 *Geo.* 3. the Court will not put a ſtrict conſtruction on it, ſo as to defeat the Plaintiffs' title to recover. 2dly, If it were neceſſary for the Plaintiffs to have recourſe to the ſecond count, their right to inſure on their own account might eaſily be eſtabliſhed, ſince, on receiving the bill of lading from the owners, they accepted a bill for 300 *l.* which created a lien on the goods to that amount.

Shepherd Serjt for the Defendant: 1ſt, The material queſtion is, whether the Plaintiffs have effected a policy within 28 *Geo.* 3.? It is clear that this caſe is not within the words of that ſtatute. The perſons whoſe names are to be inſerted are, the perſon intereſted, the conſignor, or the conſignee (none of which characters apply to the Plaintiffs); the perſon reſiding in *Great Britain* who ſhall receive the order or the perſon who ſhall give the order for effecting the inſurance. Now this caſe ſtates that the Plaintiffs had not received any order at the time when the policy was effected; the queſtion therefore is brought to this, whether the ſubſequent approbation of *Lund* be equivalent to a previous order? But whether the policy were well or ill effected muſt depend on the facts exiſting at the time when the policy was made; and as the Plaintiffs had then received no order they made an unauthorized inſurance. *Lund* might have reſolved to litigate the queſtion with the *Cudbear* Company, and have diſowned the act of the Plaintiffs, in which caſe they would have been entitled to a return of premium, no riſk having been run. If a ſubſequent acquieſcence be held tantamount to a previous order, it will be in the power of any perſon reſiding in *England* to effect a policy without order, and afterwards to ſet up an acquieſcence, or demand a return of premium, according as the riſk may turn out. I contend that the agent muſt have ſuch an order at the time of inſurance as will bind his principal. Now in this caſe if the Plaintiffs had averred that they effected the policy by order, they could not have ſupported the averment. There is no doubt that ſubſequent acquieſcence in the caſe of a general agent may be evidence of a previous order, but the fact of a previous order is abſolutely negatived by this caſe. 2dly, It is expreſsly ſtated in the caſe that the Plaintiffs did not inſure on their own account, but that they wrote to *Lund* to inform him that they had effected a policy on his account, and he agreed to credit them for the premium. However, had this not been the caſe, they could have had no inſurable intereſt, for *Lund* deſired them to hand over the bill of lading to the *Cudbear* Company, and drew on the Company in favour of the Plaintiffs to the amount of the goods. The Plaintiffs therefore accepted the bill for 300 *l.* drawn by *Lund* upon them on the faith of the conſignees accepting the bill drawn for the value of the goods, not on the faith of the goods arriving.

BULLER J. This is an action on a policy of inſurance made on goods on board the *Fahrſund's Wharf* at and from *Fahrſund* to *London.* The policy is made in the names of *Wolff* and *Dorville*, as well in their own names as for and in the name and names of all and every other perſon or perſons to whom the ſame did, might, or ſhould appertain in part or in all. This policy in its frame is very much like thoſe which we uſed to ſee ſome years before the Legiſlature interpoſed in the 25th *Geo.* 3., only I remember that the words "as intereſt may appear" were then uſually added. The ſhip ſailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* tranſaction; and no fraud has been ſuggeſted; a loſs has happened, and the underwriter now chooſes to ſay, that for want of a ſtrict compliance with the 28 *Geo.* 3. he ſhall be excuſed from paying the money. Time was, when no underwriter would have dreamed of making ſuch an objection: if his ſolicitor had ſuggeſted a loop-hole by which he might eſcape,

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he would have ſpurned at the idea. He would have ſaid is it not a fair policy? have I not received the premium? and ſhall I not now, when the loſs has happened, pay the money? This would have been his anſwer, and he would have immediately ordered his broker to ſettle the loſs. If however the Defendant can bring his caſe within the ſtatute, he has a right to do ſo, and we are bound to give him judgment. But has the Defendant brought his caſe within the meaning of the ſtatute? has he even brought it within the words of the ſtatute? And even if he had brought it within the words and not within the meaning, I ſhould be clearly of opinion for deciding againſt him; and in ſo doing I ſhould follow the directions of the ſtatute, which in the laſt clauſe ſays, "every policy "and policies of inſurance made and wrote contrary to the *true* "*intent and meaning* of this act ſhall be null and void." The objection is that the ſtatute requires the names or ſtyle and firm of dealing of the perſons intereſted, or the names or ſtyle and firm of the conſignors or conſignees of the goods inſured, or the names or ſtyle and firm of the perſons reſiding in *Great Britain*, who ſhall receive the order for and effect the policy, or of the perſons who ſhall give the order or directions to the agents immediately employed to negotiate or effect the policy to be inſerted in the policy. Now it is material to go back to a time previous to the paſſing of this ſtatute, in order to ſee what was the real meaning of the Legiſlature. My Brother *Le Blanc* very properly went into a review of the 25 *Geo.* 3. though that act has been ſince repealed. By putting the two acts together we may learn the true ſpirit and meaning of the laſt: what it was thoſe who introduced it wiſhed to be effected; and I might add from recollection what it was they profeſſed. The inconvenience recited by 25 *Geo.* 3. was the making policies in blank, and therefore it was enacted that where they were made by perſons reſiding in *Great Britain*, the names of the perſons intereſted ſhould be inſerted therein, or the names of the perſon who ſhould effect the ſame as agents for the perſons intereſted, and in caſe of perſons reſiding out of *Great Britain*, the name of the agent. Under this act it happened that many perſons not underſtanding the meaning of theſe proviſions, and not complying literally with them, loſt the benefit of their policies (*a*). The Legiſlature therefore thinking that they had drawn the ſtring too tight, recited in 28 *Geo.* 3. "that it had been found by ex-

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(*a*) *Pray and Others* v. *Edie.* 1 *Term Rep.* 313.

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" perience that great miſchiefs and inconveniences had ariſen to " perſons intereſted in ſhips and to perſons uſing commerce, from " the 25 *Geo.* 3. *c.* 44. and that it was expedient that other and " more convenient proviſions ſhould be made for the regulating " inſurances on ſhips, *&c.* than thoſe contained in the ſaid act," *&c.* Now we are bound to ſay that this ſecond ſtatute muſt receive the moſt liberal conſtruction that the words will bear. From the language of the two ſtatutes, as well as the conſideration that we are conſtruing a contract *uberrimæ fidei*; *viz.* a policy of inſurance, we muſt avoid bearing harder upon the Plaintiffs than is abſolutely neceſſary. Let us ſee then whether the Plaintiffs do or do not come within any of the deſcriptions of perſons in the laſt ſtatute. Theſe deſcriptions are four: the conſignor and the conſignee, the perſon receiving and the perſon giving the order. It is perfectly clear that the Plaintiffs are not the conſignors: but I am by no means prepared to ſay that they are not the conſignees. It is true that the goods were originally conſigned to another perſon, but the caſe muſt be conſidered as it ſtood at different periods: though the *Cudbear* Company were clearly the conſignees at firſt, it does not follow that they continued to be ſo. What is a conſignee? A conſignee is a perſon reſiding at the port of delivery, to whom the goods are to be delivered when they arrive there. *Lund* does not truſt the *Cudbear* Company without ſecuring himſelf: he therefore ſends the bill of lading to the Plaintiffs, who are his general agents, in order that he may be ſecure of being paid for his goods. Certainly if the *Cudbear* Company had received the goods, they would have been the conſignees, but they refuſed to receive them: then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the perſons who had the bill of lading and were the general agents of the conſignor? From the moment that the *Cudbear* Company refuſed to have any thing to do with the goods, the Plaintiffs became the conſignees. If this be ſo, there is no objection to the policy, and I am ſatiſfied that I do not carry this conſtruction too far when the juſtice of the caſe is with the Plaintiffs. But there are two other characters mentioned in the ſtatute. The next is the perſon who receives the order to inſure. Let us ſee therefore whether theſe Plaintiffs had not an order to make inſurance. The goods were originally intended for the *Cudbear* Company; but they were ſent, accompanied with a letter which ſtated in the cleareſt terms that *Lund* intended that they ſhould be inſured. The *Cudbear* Company having refuſed to take the goods, could the Plaintiffs, who were the general agents of *Lund*, could any man of ſenſe read his letter, and doubt of his intentions? In giving his reaſons he ſays that the ſeaſon is ſo far advanced, that he does not think it ſafe to ſend the goods without their being inſured. The Plaintiffs muſt therefore have been blind if they had not ſeen that it was his intention to have them inſured. Then what was his intereſt? Why that they ſhould be inſured. It is agreed that a general agent has a right to exerciſe his diſcretion for the benefit of his principal: he muſt act on the ſpur of the occaſion, and if nothing elſe had paſſed, I have doubts whether the conſignor would not have been liable to pay the premium. But the Plaintiffs take the opportunity to inform the conſignor of their having made the inſurance, and he highly approves of their acts (*a*), which brings the caſe within the maxim that *omnis ratihabitio retrotrahitur & mandato priori æquiparatur*. I am clear therefore that the Plaintiffs were the perſons who received the order to make this inſurance within the deſcription of the act of Parliament. But there is ſtill another character to be conſidered; the ſtatute mentions, in the laſt place, the perſon who gives the order to make inſurance. Now in my opinion it is impoſſible to ſtate a caſe that comes more directly within the act of Parliament than this. Who were the perſons immediately concerned, who immediately employed the broker, who gave the immediate order for inſurance, but the Plaintiffs? It appearing therefore that they come within the words of the act of Parliament, the caſe ſtands clear of all objections, and is in law, conſcience, and juſtice with the Plaintiffs. With reſpect to the ſecond count, I hold that the Plaintiffs had a clear right to inſure to the amount of 300*l.*, for which they were intereſted in the goods. My Brother *Shepherd* conſiders them as ſtanding without intereſt in the goods, becauſe they had only a debt againſt *Lund*. I agree that a debt which has no reference to the article inſured, and which cannot make a lien on it, will not give an inſurable intereſt. But a debt which ariſes in conſequence of the article inſured, and which would have given a lien on it, does give an inſurable intereſt. The caſe is not at all altered by the goods not having arrived. There is no more common tranſaction

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(*a*) Vid. *French* v. *Backhouſe*, and *French* v. *Foulſton*, 5 *Burr.* 2727.

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action in the city of *London* than to raiſe money on the ſecurity of a bill of lading and policy: theſe Plaintiffs, having advanced their money on that ſecurity, muſt, if the goods had arrived, have received 300*l.* out of them; the goods being loſt, the policy of inſurance ſtands in the place of them, and the Plaintiff is entitled to receive that ſum under the policy. By my note it appears that the Chief Juſtice, when this caſe was firſt moved, delivered a clear opinion in favour of the Plaintiffs: on the whole therefore I think the caſe is moſt decidedly with them.

HEATH J. I am of the ſame opinion. But as my Brother *Buller* has entered ſo fully into the caſe, I ſhall ſpeak more ſhortly than I ſhould otherwiſe have done. This ſtatute was made to prevent unlawful gaming. It is therefore enacted that no perſons ſhall recover under policies of aſſurance, but thoſe who have either an intereſt as principals, or have acted as agents. In the firſt place then I think that the Plaintiffs were clearly the conſignees of the goods: for the bills of lading were ſent to them, and they had a right to take poſſeſſion. The ſtatute alſo ſays, that if the names of the conſignor or conſignees be not inſerted, that of the perſon giving or receiving the order for the inſurance ſhall be inſerted. While the ſhip is in ſafety, where is the difference whether the agent inſure without order, and the principal afterwards approve of the inſurance, or firſt receive the order and then inſure? On the ſecond count it is equally clear, that the Plaintiffs had an inſurable intereſt. It is true that if the *Cudbear* Company had altered their minds and taken to the cargo, that the Plaintiffs would have had no intereſt, but if they had a contingent and reaſonable expectation of intereſt, it was ſufficient to entitle them to inſure, according to what was held in *Le Cras* v. *Hughes* (*a*), *viz.* that a certain expectation of receiving property captured for the emolument of the captors, from the Crown, would give an inſurable intereſt.

ROOKE J. I agree in opinion with my Brothers. I think that the Plaintiffs may be conſidered as conſignees of theſe goods, and I alſo think that they may be conſidered as having received orders from the principal to inſure, what they did having been ſubſequently adopted by him. But there is one ground on which I have no doubt, namely that the Plaintiffs come within the laſt deſcription of perſons mentioned in the ſtatute. They are the perſons who gave the immediate order, in conſequence of which the

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(*a*) *E.* 22 *Geo.* 3. *B. R. Park on Inſur.* 269.

the policy was effected. The act of 28 *G.* 3. was made to remedy the inconveniences which were experienced under the 25 *G.* 3. and therefore we are bound to give it a liberal conſtruction. I think the Plaintiffs clearly entitled.

Poſtea to the Plaintiffs (*a*).

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Bail were allowed to juſtify after the rule on the ſheriff had expired, on payment of the coſts of the oppoſition.

LE BLANC Serjt. moved to juſtify bail, but *Runnington* Serjt. oppoſed the juſtification, on the ground of the rule to bring in the body having expired yeſterday, and that the ſheriff was therefore in contempt.

But the Court overruled the objection and allowed the bail to juſtify on the Defendant undertaking to pay the coſts of the oppoſition (*a*).

If a man carry on his buſineſs at a lodging in one place, and keep a houſe at another, notice of bail deſcribing him as of the former place is ſufficient.

Runnington then objected to the notice, becauſe one of the bail was deſcribed therein as of *Coppice Row*, whereas it appeared that he had only a lodging in that place where he carried on his buſineſs, but that his houſe was in *Southampton Row*.

The Court however held the deſcription ſufficient, ſaying he was moſt likely to be found at the place where he carried on his buſineſs; that he had been found accordingly and was a houſekeeper.

Bail allowed.

MADDOCKS and Another *v.* BULLCOCK.

Nov. 18th.

If a Defendant ſurrender himſelf it is a ſufficient performance of the condition of the bail-bond, without putting in bail. But he muſt give notice of ſuch ſurrender.

THE Defendant in this caſe having been arreſted, a bail-bond was taken by the ſheriff; bail above were not put in, but before the return of the writ the Defendant ſurrendered himſelf; no notice however having been given to the Plaintiff of the ſurrender, he took an aſſignment of the bail-bond and proceeded againſt the bail.

A rule *niſi* having been obtained by *Cockell* Serjt. on a former day for cancelling the bail-bond and ſtaying proceedings thereon; *Williams* Serjt. was now proceeding to ſhew cauſe againſt the rule

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(*a*) See *Craufurd* v. *Hunter*, 8 *T. R.* 13.

(*a*) But the Court will ſet aſide an attachment obtained againſt the ſheriff after the bail has juſtified, with coſts; though the rule to bring in the body has expired before the juſtification. *Thorold* v. *Fiſher*, 1 *H. Bl.* 9.

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on the authority of *Harriſon* v. *Davies*, 5 *Burr*. 2683. where it was held that the Defendant's ſurrender was no performance of the condition of the bail-bond, but that he muſt put in bail: however, on a queſtion from the Court he admitted that the above caſe had been overruled in *Jones* v. *Lander*, 6 *T. R.* 753., and *Stamper* v. *Milbourne*, 7 *T. R.* 122., but added, that there was a difference in this caſe, no notice having been given of the ſurrender.

The Court ſaid that as no notice had been given, the coſts of the proceeding muſt be paid up to the preſent time, and with that term made the

Rule abſolute.

Nov. 19th.

Williams Executor of Elizabeth Breedon *v.* Bartholomew.

If *A.* tenant for life ſubject to forfeiture, remainder over to *B.*, leaſe to *C.* for a term, and afterwards apprehending that he has forfeited, acquieſce in *B.*'s claiming and receiving the rent from *C.*, his executor may, on ſhewing that he acquieſced under a falſe apprehenſion, recover from *C.* the amount of the rent erroneouſly paid to *B.*

Covenant for rent. The declaration ſtated that by indenture dated the 2d of *February* 1789, *E. Breedon* demiſed certain premiſes to the Defendant, to hold from the 29th of *September* 1788, for the term of twenty-one years, determinable at the deceaſe of *E. Breedon*, at the yearly rent of 130 *l.*; that *E. Breedon* died on the 30th *October* 1793, having made the Plaintiff her executor; and that on the 29th of *September* 1793, five years rent amounting to 650 *l.* became due from the Defendant to *E. Breedon* in her lifetime. Breach, that Defendant had not paid this ſum to *E. Breedon* in her lifetime, or to the Plaintiff ſince her death.

Pleas. 1ſt, That the Defendant in the lifetime of the ſaid *E. Breedon*, to wit, on the 29th of *September* 1793, paid to the ſaid *E. Breedon* the ſum of 650 *l.* being the amount of five years rent of the ſaid term in the ſaid declaration mentioned, ending on that day according to the form and effect of the ſaid indenture, and the Defendant's covenant therein; concluding to the country. 2d, That the premiſes in queſtion were ſettled on *E. Breedon* by way of jointure, at the time of her marriage with *S. Breedon*, as to the uſe of the ſaid *E. Breedon*, for her life, and ſo long as ſhe ſhould continue ſole and unmarried, from and after the death of the ſaid *S. Breedon*, remainder to his right heirs; that on the 24th of *November* 1776, *S. Breedon* died, and that on the 5th of *November* 1786, *E. Breedon* intermarried with *W. Williams* the father of the preſent Plaintiff, whereupon her intereſt in the premiſes determined; And this, &c. wherefore, &c.

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WILLIAMS *v.* BARTHOLOMEW.

Replication, taking iſſue upon the firſt plea, and traverſing the marriage with *W. Williams*, ſtated in the ſecond plea; and on this alſo iſſue was joined.

This caſe came on to be tried before *Heath* J., at the *Berkſhire* Summer aſſizes at *Abingdon*, when it appeared that the premiſes were ſettled on *E. Breedon* as ſtated in the ſecond plea; that after the death of *S. Breedon* ſhe clandeſtinely married *W. Williams* at the chapel of the *Savoy;* but continued to receive the rent for ſome years, until Dr. *Breedon* the remainder-man being informed of the marriage, and that ſhe had forfeited her eſtate thereby, claimed the rent of the Defendant, who accordingly paid it to him for the five years in queſtion, with the knowledge and acquieſcence of *E. Breedon.* It was proved in anſwer to the ſecond plea, that at the time of the intermarriage of *E. Breedon* with *W. Williams*, he had another wife living. A queſtion being raiſed, whether theſe facts would ſupport the firſt iſſue, *Heath* J. was of opinion that they would not, and accordingly under his direction a verdict was taken for the Plaintiff, but if the Court ſhould be of opinion that payment by the Defendant to Dr. *Breedon* under the above circumſtances proved the firſt iſſue, then a verdict on that iſſue to be entered for the Defendant.

A rule *niſi* having been obtained for this purpoſe on a former day,

Le Blanc and *Shepherd* Serjts. now ſhewed cauſe. The only queſtion here ariſes on the firſt iſſue, it having been clearly proved under the ſecond, that the marriage of *E. Breedon* with *W. Williams* was void. The payment in this caſe was made to Dr. *Breedon* under a miſtake; not as agent to *E. Breedon*, nor under the idea of her having directed it. Had Dr. *Breedon* been ſteward to *E. Breedon*, the payment might then have been conſidered as made to her: but, this was an adverſe payment to a perſon who claimed the rent as his own upon falſe grounds. If tenant in fee make a leaſe and die, and *A. B.* enter and receive the rents before the heir at law is aware of his title, the tenant ſhall not defend himſelf in an action for rent brought by the heir at law, by ſaying that he has already paid the rent to *A. B.*

Williams Serjt. for the Defendant. It is true that payment of rent by the tenant to a perſon who claims adverſely without the knowledge of the party having the right to it cannot be ſupported. But I contend that the circumſtances of this caſe amount to evidence

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dence to be left to a jury, that the rent was paid by the direction of *E. Breedon*, which would make it a payment to herſelf. The payment to Dr. *Breedon* under an idea on all ſides that he was entitled to the rent, amounts to an agreement on the part of *E. Breedon*, that it ſhould be paid to him. Where a mortgagee or obligee agrees that the mortgagor or obligor ſhall pay the intereſt to a ſcrivener, it is a good payment, though he has neither the cuſtody of the mortgage, nor the bond. *Whitlock* v. *Waltham*, 1 *Salk.* 157. Suppoſe *E. Breedon* had ſaid to the Defendant, "I "have forfeited the eſtate, and you muſt pay the rent to Dr. *Breedon*;" the payment would have been protected: now if her conduct amount to a confirmation of the payment, it muſt have the ſame effect, according to the maxim that *omnis rati-habitio retro-trahitur et mandato priori æquiparatur*. This cannot be called a voluntary payment by the tenant, for if Dr. *Breedon* had diſtrained and avowed in replevin for rent in arrear, what plea in bar could the tenant have ſet up? Nor was it a payment by miſtake, having been made with the knowledge of the leſſor, to whom all the fault and laches muſt be imputed.

Buller J. If money be paid to *A.* by the direction of *B.*, it is a good payment to *B.*; but I can never agree that if money be paid to *A.* ſimply with the knowledge of *B.*, it will be a payment to *B.* Suppoſe that one diſſeiſes another of an eſtate and continues in poſſeſſion of the rents and profits with the knowledge of the diſſeiſee, will any body ſay that the diſſeiſee ſhall not recover againſt the tenant? Knowledge will not do, there muſt be conſent, direction, and authority. Here there clearly was no order. This poor woman thought that ſhe was not entitled to the rent: Dr. *Breedon* therefore obtained it in ſpite of her, in conſequence of her perſuation, that ſhe was not entitled. If ſhe allows Dr. *Breedon* to receive the rent under the idea that ſhe has no right, how can we conclude from that circumſtance, that ſhe would have done the ſame if ſhe had been appriſed of her right? It has been argued, that if Dr. *Breedon* had diſtrained and avowed in replevin, the tenant could have made no anſwer: but I ſee no difficulty in that. Every tenant is bound by his attornment; the Defendant might have pleaded that he did not hold as tenant to Dr. *Breedon*; and if Dr. *Breedon* had ſaid "You have attorned "to me;" the Defendant might have anſwered "I did that on "your miſrepreſentation, who claimed as remainder-man;" and might have ſhewn, that Mrs. *Breedon* was ſtill alive and entitled.

If Mrs. *Breedon* had ordered the Defendant to pay the money to Dr. *Breedon*, the payment could never afterwards have been queſtioned. The tenant in that caſe would have had nothing to do with any tranſaction between Mrs. *Breedon* and Dr. *Breedon*, be the title what it might: if he had obeyed the order of Mrs. *Breedon*, it would have been a payment to her agent. The next queſtion then is, whether there be any thing in Mrs. *Breedon*'s conduct which amounts to a confirmation of the payment? Now, to conſtitute that, ſome act muſt appear to have been done by her with knowledge of her own ſituation. Here a right to the rent was inſiſted upon by Dr. *Breedon*; and Mrs. *Breedon*, being deceived both in point of law and fact, acquieſced in the payment of that rent to another to which ſhe was entitled. Her right, therefore, ſtands as it did before Dr. *Breedon*, whoſe claim was clearly adverſe, received any rent at all.

HEATH J. I continue of the opinion which I held at the trial. It does not ſeem to me that the Defendant was under any peculiar difficulty. He might have had recourſe to a bill in equity to be indemnified. What was ſaid by my Brother *Shepherd* ſtruck me very much. Suppoſe a leaſe made, and a perſon claim as heir at law, to whom the rent is paid; and afterwards the true heir at law is diſcovered, will it be ſaid that he ſhall not recover?

ROOKE J. The tenant having taken a leaſe from Mrs. *Breedon*, muſt anſwer for the defect of rent. She made a miſtake, and thought her title at an end when it was not; the miſtake was afterwards diſcovered, and her executor is therefore now warranted in recovering the rent from the tenant.

Rule diſcharged.

WILLIAMS, Executor of ELIZABETH BREEDON, *v.* BREEDON.

Nov. 19th.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given applicable to the bad count alſo.

TRESPASS. The firſt count was for *cutting down*, felling, throwing down, grubbing up, proſtrating, and deſtroying the timber-trees and other trees, and the underwood and coppices of underwood of *Elizabeth Breedon* deceaſed, in her life-time, of the value of 300 *l.*, and the buſhes and boughs thereof coming taking, and carrying away, and converting to the uſe of the Defendant.

The ſecond count was for ſeizing, taking, and carrying away the goods and chattels, *viz.* wood, timber, underwood, buſhes, and boughs of the ſaid *Elizabeth* deceaſed, in her life-time, of the value of other 300 *l.*

Plea. Not Guilty.

At the trial before *Heath* J., at the *Berkſhire* Summer aſſizes at *Abingdon*, it was proved that the Defendant (the remainder-man mentioned in the laſt caſe, and who had acted on an idea that *Elizabeth Breedon* had forfeited her intereſt in the premiſes by a ſuppoſed marriage with one *William Williams*) *cut down* the wood in queſtion: and the ſeveral ſums of money for which he ſold the different parcels being aſcertained; the jury found a verdict for the Plaintiff with general damages to that amount, but if the Court ſhould be of opinion that the action was not maintainable, then a verdict to be entered for the Defendant.

However, *Williams* Serjt. on a former day having obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted:

Le Blanc now ſhewed cauſe againſt that rule. Admitting that an executor cannot maintain this action for trees cut down in the life-time of his teſtator (*a*), under the firſt count of this declaration, yet as it appears by the report that the evidence on which the verdict of the jury was founded applies to the ſecond count only, the Court may rectify any miſtake by entering a verdict on that count.

Williams Serjt., in ſupport of the rule, contended that as evidence was produced at the trial of the fact of *cutting down* the trees, and the jury had given general damages, the Court could not apply thoſe damages to the ſecond count only, and that if therefore the firſt count was bad, the judgment muſt be arreſted.

Buller J. As evidence was given at the trial of the fact of cutting down, if there had been no other evidence to ſhew on what ground the damages were given by the jury, it certainly would not be competent to the Court to alter the verdict. But in this caſe there was evidence to ſhew that the damages given by the jury were compounded of the different ſums for which the parcels of wood cut down by the Defendant were ſold. This circumſtance, therefore, does entitle the Judge to alter the *poſtea*, and the Court

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(*a*) Vid. *Emerſon* v. *Emerſon*, 1 *Vent.* 187. and alſo *De Maſon* v. *Dixon*, Sir *William Jones* 174, where *Hyde* and *Jones* Jˢ held that the 4 *Ed.* 3. *c.* 7. did not give treſpaſs to an executor for a *clauſum fregit* or trees cut in the life-time of his teſtator.

Court muſt conſider the caſe in the ſame light as if a verdict had been found for the Defendant on the firſt count, and for the Plaintiff on the ſecond.

Per Curiam, Rule diſcharged (*a*).

(*a*) *Eddowes and Another* v. *Hopkins and Another*, *Doug.* 376. *Grant* v. *Aſtle*, *Doug.* 730. alſo *Spencer* v. *Goter*, 1 *H. Bl.* 78.

BELL *v.* STONE.

Nov. 19th.

A letter written to a third perſon calling Plaintiff "a villain," held actionable, without proof of ſpecial damage.

ACTION on the caſe for defamation. The firſt count of the declaration, after ſtating that the Plaintiff was a land-ſurveyor, averred that the Defendant, intending to injure him in his reputation and hurt him in his profeſſion, wrongfully and maliciouſly wrote and publiſhed a certain ſcandalous, malicious, and defamatory libel, in the form of, and as a letter addreſſed to one *N. B.* to whom the Plaintiff was indebted in a large ſum of money, in which letter was contained, of and concerning the Plaintiff, the following matter: "After the communication I had with your "ſon in your abſence, I but little thought you would have been "made the dupe of one of the moſt infernal villains that ever diſ"graced human nature; but I ſuppoſe you were deceived by thoſe "whom you thought well of, and whom he will deceive if they "will give him an opportunity; I am told they are reſpectable, "and how they can be connected with him is the moſt aſtoniſhing "thing to me; Mr. *H.* writes me you called upon him (meaning "the Plaintiff) on the ſubject of your account, for which the vil"lain gave you his note at five months;" that the Defendant in further proſecution of his ſaid malice ſent the ſaid letter to the ſaid *N. B.*, to the great hurt, prejudice, and injury of the Plaintiff, and to his great diſcredit and diſgrace. There were other counts on words ſpoken in derogation of the Plaintiff's profeſſional character, and of his ability to pay his debts. The concluſion, referring to all the counts, ſtated that the Plaintiff ſuffered ſpecial damage in conſequence of publiſhing the ſaid libel and ſpeaking the ſaid words, *viz.* that he was arreſted by the ſaid *N. B.* for the ſum which he owed to him, and that he loſt his buſineſs, &c.

Plea. The general iſſue.

This came on to be tried at the *Bedford* Summer aſſizes, when, the Plaintiff having failed in proving the ſpecial damage laid, *Macdonald* Ch. B. was of opinion that the letter on which the firſt

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count proceeded, unſupported by proof of ſpecial damage, was not actionable, and directed a verdict for the Defendant. The counſel for the Plaintiff, however, contending that the letter itſelf was actionable, the Chief Baron aſked the jury what damages they would give ſuppoſing the Plaintiff entitled to a verdict in point of law. The jury anſwered 1*s*.

Sellon Serjt. on a former day obtained a rule to ſhew cauſe why the verdict for the Defendant ſhould not be ſet aſide, and a verdict be entered on the firſt count for the Plaintiff for 1 *s*., on the ground that though the words in the firſt count might not be actionable, if only ſpoken, yet that being committed to writing, they were ſo.

Le Blanc Serjt. was this day to have ſhewn cauſe,

But the *Court* expreſſing themſelves clearly of opinion that any words written and publiſhed, throwing contumely (*a*) on the party, were actionable, *Le Blanc* declined arguing the point, and the

Rule was made abſolute (*b*).

Nov. 20th.

Le Grew *v.* Cooke.

If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought.

Assumpsit. The Defendant pleaded as to all but 30*l*. non-aſſumpſit, and as to that ſum a tender, and brought the money into court. The Plaintiff replied an original ſued out on a particular day, and that the money was not tendered before that day, but took the money out of court.

A rule having been obtained on a former day, calling on the Plaintiff to ſhew cauſe why the replication to the plea of tender ſhould not be ſtruck out, on the ground of the Plaintiff's having admitted the tender by taking the money out of court:

Le Blanc Serjt. now ſhewed cauſe. In an action on the caſe, where the cauſe of action does not ariſe from the non-payment of a particular ſum at a particular day, the plea of tender admits the ſum tendered to be due to the Plaintiff, and only denies his right to damages beyond that ſum. But to the ſum tendered the Plaintiff will be entitled, even though he ſhould be nonſuited or a verdict paſs againſt him, becauſe the Defendant has admitted ſo much to be due to him: nor will the Court retain that money in their hands which muſt belong to the Plaintiff, in order to ſecure the

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(*a*) 5 *Co.* 125. *b.*

(*b*) Sir *John Auſtin* v. Col. *Culpepper*, *Skyn*. 124. 2 *Show*. 313. *Harman* v. *Delaney*. 2 *Str*. 899. *Fitzgib*. 253, 4. *Villers* v. *Monoley*, 2 *Wilſ*. 403. *King* v. Sir *Edward Lake*, *Hardres*, 470.

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Defendant's coſts. *Cox* v. *Robinſon*, 2 *Str.* 1027. *Caſ. temp. Hard.* 206. *S. C.*

Cockell and *Shepherd* Serjts. *contrà*. It is ſaid in 1 *Crompton's Prac. p.* 150. that "If a tender be pleaded with a *toujour priſt*, "and the money brought into court, if the Plaintiff would go for "further damages he muſt not take the money out of Court, but "take iſſue on the tender, or reply a requeſt and refuſal; and if ſuch "iſſue is found againſt him he will be barred of his action: but if "he take the money tendered out of court, judgment is given for "the Defendant to go quit;" and a caſe in this court of *Cliff* v. *Jones*, *T.* 5 *Geo.* 1. *C. B.* is there cited. This doctrine is perfectly agreeable to the opinion of Lord *Holt*, in the caſes of *Horn* v. *Lewin.* 1 Lord *Raym.* 643. and *Burton* v. *Souter.* 2 Lord *Raym.* 774. And the reaſon why a party ſhould not take money out of court when he traverſes the tender, is given in *Hill* v. *Williams*, *Barnes* 358. 3d ed., namely, that the replication to the tender is a refuſal to accept the money.

Buller J. This is a point of practice which I had thought as clearly ſettled as any point ever was; and I am much deceived if it has not been more than once before the Court of King's Bench. It is perfectly certain, that whatever may become of this action, the Plaintiff will be entitled to the money tendered: and if that be the caſe, by what right can the Court retain it, as a ſecurity for the Defendant's coſts, on the chance of a verdict being given in his favour? I agree that if the Plaintiff be negligent and do not take the money out of court until after a verdict has paſſed for the Defendant, that the Court will lay hold of it to ſecure the Defendant's coſts (a): and if it could be ſhewn that the Plaintiff was now in that ſituation, the Court would not let him take out the money without doing juſtice to the Defendant. It being once admitted that the Plaintiff will be entitled to the money tendered at all events, the application muſt fall to the ground. The reaſon given in *Barnes* againſt allowing the Plaintiff to take the money out of court is abſurd; that caſe is therefore *felo de ſe*, and the preſent application reſts upon no other foundation than the opinion of a writer, who has indeed in general reported the practice of the

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(a) Vid. *Rathbone* v. *Stedman*, *Cooke's Caſ. Prac. C. B.* 54. and *Maddox* v. *Paſton*, *id.* 117. where money having been paid into court on the common rule and verdicts found for the Defendants, they were allowed to take it out of court in part of their coſts.

Court with accuracy, but whoſe aſſertion in this caſe is unſupported by authority, and contradicted by reaſon.

Per Curiam, Rule diſcharged (*a*).

(*a*) In an anonymous caſe, *M.* 11 *Ann. Cooke's Caſ. Prac. C. B.* 5. an executor Defendant having paid money into court on the common rule, was allowed to take it out again after a nonſuit; but it was ſaid that if Defendant had not been executor or adminiſtrator, the Plaintiff ſhould have had the money: and accordingly a ſimilar application in *Lane and Others* v. *Wilkinſon*, *T.* 13 *Geo.* 1. *id.* 36., where the Defendant was neither executor nor adminiſtrator, was refuſed. And in *Elliot* v. *Callow*, *Salk.* 597. the Plaintiff, after a nonſuit, was allowed to take money out of court which had been paid in on the common rule. But it was there ſaid that if money be paid into court on a plea of tender, and Plaintiff takes iſſue on the tender which is found againſt him, the Defendant ſhall have the money. *Vid.* alſo. 21 *Ed.* 4. 25. *pl.* 15. *Co. Litt.* 207, *a.* *Harrold* v. *Clotworthy*, *Cro. Jac.* 126., and *Benſkin* v. *Herick*, *Style* 388. where that was held to be the law.

Nov. 20th.

WILLIAMS v. WATERFIELD.

The Court allowed the Defendant to juſtify bail after an attachment iſſued againſt the ſheriff, but gave leave to the Plaintiff to oppoſe them without prejudice.

SHEPHERD Serjt. having moved to juſtify bail; *Le Blanc* Serjt. objected, that an attachment had already iſſued againſt the ſheriff, becauſe bail were not put in in time, and that if he now oppoſed the bail without ſucceſs, it would not be competent (*a*) to him afterwards to oppoſe ſetting aſide the attachment againſt the ſheriff, whereas if he did not oppoſe the bail, and the Defendant ſhould afterwards ſucceed in a motion to ſet aſide the attachment, the Plaintiff might have bad bail.

BULLER J. It was the practice in the King's Bench in theſe caſes, and it ſeems to me to be the moſt convenient mode, for the Defendant to move for a rule to ſhew cauſe, why on putting in bail, the proceedings againſt the ſheriff ſhould not be ſtayed, and to have the bail ready to juſtify when that rule ſhould be diſpoſed of. But though that may be the better courſe in future, it muſt not affect this caſe.

Per Curiam, Leave given to the Defendant to juſtify his bail, and to the Plaintiff to oppoſe them without prejudice.

(*a*) But in *Boldero* v. *Gray*, *Cowp.* 769. where the ſame objection was ſtarted to the practice then prevailing, of an exception to bail being a waver of the bail-bond, the Court of K. B. reſolved, that as the ſheriff after he has been ruled muſt give notice that he will put in and perfect bail before he can diſcharge himſelf, ſo a ſimilar notice ſhould be given in order to ſtay proceedings on the bail-bond, and then Plaintiff may oppoſe the bail in Court, without its being any waver.

DICKENSON, Executor, &c. *v.* BOYNE.

Nov. 21ſt.

The Court ſet aſide a judgment and warrant of attorney given to ſecure an annuity for a defect in the memorial, without coſts, becauſe it was the caſe of an executor.

SHEPHERD Serjt. moved to make a rule abſolute for ſetting aſide a judgment and warrant of attorney, given to ſecure an annuity on the ground that a clauſe of redemption contained in the deed was not inſerted in the memorial.

Le Blanc Serjt. on the part of the Plaintiff, admitted the law (*a*) to be againſt him, but obſerved that as this was the caſe of an executor who could not be aware of the nature of the deeds, it would be hard to oblige him to pay coſts.

And the Court being of that opinion made the

Rule abſolute without coſts.

(*a*) Vid. *Ex parte Anſell, ante*, 62. and the authorities there cited.

ENGLAND *v.* KERWAN.

Nov. 21ſt.

Where bail are regularly put in and excepted to, the Defendant need not deſcribe them in his notice of juſtification.

BAIL having been regularly put in and excepted to, the Defendant's attorney gave a notice of juſtification to the Plaintiff's attorney, to the following effect: "Take notice that *J. R.* "of, *&c.* will be added to the bail already put in, and that the "ſaid *J. R.* and *John Binford* of whom you have already had "notice, will on, *&c.* juſtify, *&c.*" *John Binford* was fully deſcribed when originally put in, though no deſcription was added to his name in this notice.

Shepherd Serjt. oppoſed the juſtification, inſiſting that a deſcription of *John Binford* ſhould have been inſerted in the notice.

Le Blanc Serjt. *contrà*, contended, that when bail are regularly put in, no deſcription need be inſerted in the notice, and that the Defendant therefore had done all that was requiſite in deſcribing the added bail.

The Court finding on application to the officer, that where bail are regularly put in and excepted to, it is not the practice (*a*) for the Defendant to inſert any deſcription in his notice of juſtification,

Admitted the bail.

(*a*) 1 *Crompton's Pr.* 61. *Tidd. Pr.* 138.

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Nov. 22d.

It is no objection to a priſoner being diſcharged under the Lords' act, that his creditor is dead. An attorney in cuſtody on an attachment for not paying over money received by him in the courſe of a ſuit, may be diſcharged under the Lords' act. The Court cannot under the words of 37 *Geo.* 3. *c.* 8. *ſ.* 2. moderate the ſum to be paid to a priſoner on his being remanded, but a note muſt be ſigned for the full ſum directed by that act. Such note cannot be ſigned by the creditor's attorney, if his client be dead.

The KING *v.* DAVIS, one, &c.

THE Defendant having been impriſoned under an attachment for non-payment of money to the Plaintiff, in a cauſe of *M'Intoſh* v. *Munday*, which he had received as attorney, was this day brought up to be diſcharged under the Lords' act.

Runnington Serjt. in oppoſition to his diſcharge, 1ſt, produced an affidavit that by accounts of the ſtate of *M'Intoſh*'s health, very lately received from *Bath*, there was every reaſon to believe that he was no longer alive; and urged that if he were dead, there was no one to whom notice could be given according to the proviſions of the act; 2dly, he contended, that as the Defendant was impriſoned by attachment, he was not diſchargeable (*a*) under the ſtatute.

But the Court over-ruled both objections, ſaying as to the laſt, that an attachment for non-payment of money is an execution (*b*).

Runnington then applied to the Court to remand the priſoner on payment of a leſs ſum than 3*s.* 6*d.* *per* week, inſiſting that the Court was authorized ſo to do, both by the words of 32 *Geo.* 2. *c.* 28. *ſ.* 13. which directs the Court to diſcharge the priſoner, unleſs the creditor will ſign a note "to pay and allow weekly a "ſum *not exceeding* 2*s.* 4*d.*" and by the caſe of *Hill* v. *Wadmore*, *Barnes* 387. ed. 3. where the Court ſaid that they had power to moderate the allowance, and remanded the Defendant upon the Plaintiff's allowing him 6*d.* *per* week; he added that there was ſtrong reaſon for the Court to exerciſe their power in this caſe, where the ground of impriſonment was, that the Defendant had received money as attorney in a cauſe, and retained it in his own hands when he ought to have paid it over.

The Court rejected the application, being of opinion that the words of the laſt act (*c*) which extend the allowance to 3*s.* 6*d.* *per* week, do not leave any diſcretionary power in the Court.

(*a*) *Sed* vid. *Rex* v. *Stokes*, *Cowp.* 136. where it was held that a party in cuſtody upon an attachment for non-payment of coſts may be diſcharged under the Lords' act. Vid. *etiam Rex* v. *Pickerill*, 4 *T. R.* 809. and *Rex* v. *Wilkinſon*, 7 *T. R.* 156.

(*b*) *Rex* v. *Myers*, 1 *T. R.* 265. *Bonafous* v. *Schoole*, 4 *T. R.* 316.

(*c*) 37 *Geo.* 3. *c.* 85. *ſ.* 2. makes it lawful for the Court to diſcharge the priſoner, unleſs the creditor, his executors, adminiſtrators, or aſſigns, inſiſt upon ſuch priſoner being detained in priſon, and ſhall "agree "in the manner mentioned in the laſt act "with reſpect to the allowance not exceeding 2*s.* 4*d.* *per* week, to pay and allow "weekly a ſum not exceeding 3*s.* 6*d.* as "any ſuch Court ſhall think fit unto ſuch "priſoner," to be paid at the times, and ſubject to the regulations mentioned in the laſt act.

When the diſcharge was about to take place, the attorney concerned for *M'Intoſh* gave a note for the weekly allowance of 3*s.* 6*d.* ſigned by himſelf.

Sed per Buller J. The note muſt be given by the party in the ſuit, though in ſome caſes it may be ſigned by his attorney; here it has been ſtated that the party himſelf is dead.

Per Curiam, Let the priſoner be diſcharged.

Hogan *v.* Page.

Nov. 23d.

Proceedings on a ſingle bond ſtayed by the Court on payment by the obligor of principal and coſts, without intereſt.

Le Blanc Serjt. moved for a rule *niſi* to ſtay proceedings on a ſingle bond on payment of 105 *l.* together with the coſts of the action.

Cockell Serjt. for the Plaintiff, ſtated, that the only queſtion was, whether the Plaintiff was entitled to intereſt on which they wiſhed to take the opinion of the Court.

The bond was in this form.

Know all men by theſe preſents, that I *R. Page* am held and firmly bound unto *M. Hogan*, maſter of the ſhip *Cornwallis*, in 105*l.* of good and lawful money of *Great Britain*, to be paid to the ſaid *M. Hogan*, his executors, adminiſtrators, and aſſigns, in conſideration of being found in a paſſage by the ſaid *M. Hogan*, and on the ſame ration as the ſeamen of the ſaid ſhip, with all medical aſſiſtance during the ſaid voyage to *England*, for which payment to be well and truly paid, I bind myſelf, my executors, and adminiſtrators, firmly by theſe preſents. Sealed, &c. and dated 13th *May*, 36 *Geo.* 3.

The Court were clearly of opinion, that no intereſt ought to be given, and made the

Rule abſolute (*a*).

(*a*) *Secus*, in the caſe of a bond conditioned for the payment of a leſſer ſum; on which intereſt muſt be paid from the day of the date, though no intereſt be reſerved in terms, nor any day certain for payment expreſſed. *Farquhar* Bart. v. *Morris*, 7 *T. R.* 124.

Roberts *v.* Giddins.

Nov. 23d.

An affidavit to ſupport a rule *niſi* for ſtaying proceedings on a bail-bond, ſhould be entitled in the action againſt the bail.

Clayton Serjt. before ſhewing cauſe againſt a rule for ſtaying proceedings on the bail-bond, objected to the affidavit on which the rule *niſi* had been obtained, becauſe it was intitled in the action againſt the bail, whereas it is the uſual practice for theſe motions to be made in the original action; which practice, he ſaid, had been adopted in order to ſave expence to the parties.

Sed per Buller J. The action on the bail-bond is depending: then why ſhould not this affidavit be read? Where indeed, no action againſt the bail is commenced, as if a motion be made to cancel the bail-bond, the affidavit muſt be intitled in the original action; for unleſs it be intitled in ſome action, no perjury can be aſſigned upon it.

Per Curiam, Let the affidavit be read.

Nov. 24th.

Cox *v.* Kitchin.

Where no point has been ſaved at the trial, the Court will not ſet aſide a verdict on a queſtion of law, if the juſtice and conſcience of the caſe be with it.

It ſeems that a woman living apart from her huſband in a ſtate of adultery, is liable on her own contracts, though ſhe has no ſeparate maintenance.

Indebitatus aſſumpſit, for goods ſold and delivered, and work and labour done.

Plea, General iſſue.

The cauſe was tried before *Rooke* J. at the *Weſtminſter* ſittings in this term, when it appeared, that the Defendant was the wife of one *Wells* who was then living, but that for the laſt four or five years ſhe had gone by the name of *Kitchin*, having lived during that time as miſtreſs with a perſon of that name (*a*); that ſhe kept an hotel, and that the action was brought by the Plaintiff as a carpenter, for materials found, and work done, in fitting up the hotel. The learned Judge directed the jury, in caſe they ſhould be of opinion that the Defendant was living in a ſtate of open adultery at the time of the contract made, to find a verdict for the Plaintiff, for as the huſband under thoſe circumſtances would not then be liable, he thought that the wife muſt be liable herſelf (*b*). A verdict was accordingly found for the Plaintiff. No point was ſaved for the opinion of the Court.

Williams Serjt. on this day moved for a rule to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a new trial be had on the authority of *Gilchriſt* v. *Brown*, 4 *T. R.* 766., where it was decided on demurrer, that a replication to a plea of coverture was bad becauſe it was deſtitute of the principle on which all the

modern

(*a*) In *Norwood* v. *Stevenſon*, *T.* 11 & 12 *Geo.* 2. *B R. Bull. N. P.* 136. and in *Hudſon* v. *Brent*, ſittings after *Hil. T.* 26 *Geo.* 3. *coram* Lord *Mansfield*, *Eſp. N. P.* 124. it was held that if a man cohabits with a woman, allows her to aſſume his name and paſſes her to the world as his wife, though in fact he is not married to her, yet *he* is liable to her contracts for neceſſaries.

(*b*) It was taken for granted by the Judges on both ſides in *Manby and Another* v. *Scott*, 1 *Lev.* 4. that the wife could never be charged; though they differed as to the liability of the huſband. And in *Hatchett* v. *Baddeley*, 2 *Bl. Rep.* 1082. *Blackſtone* J. held, that although the huſband were not bound to pay the debt, it did not follow as a legal conſequence that the wife ſhould be compelled alone: and he was of opinion in that caſe, that the debt could not be recovered of either.

modern caſes had proceeded, where femes coverts had been held liable; *viz.* a ſeparate maintenance.

Buller J. This caſe comes before the Court under very different circumſtances from thoſe of the caſe cited. The queſtion there aroſe on demurrer, whereas this is a motion to ſet aſide a verdict. Motions for new trials are governed by the diſcretion of the Court. Where the Judge at *Niſi Prius* has thought fit to ſave a point; the Court has been in the habit of conſidering itſelf in the ſituation of a judge, at the time of the objection raiſed. But this caſe comes before us without any point ſaved, and therefore we muſt look to the general juſtice of the caſe before we interpoſe by granting a new trial; nor is it neceſſary that we ſhould nicely examine whether the Defendant be ſtrictly liable in point of law. The leading reported deciſion on the ſubject of granting new trials is that of the Dutcheſs of *Mazarine* (*a*). There can be no doubt but that was the caſe of a verdict againſt law: yet the Court ſaid that as the juſtice and conſcience of the caſe were clearly with the verdict, they would not interpoſe (*b*). Here it is perfectly clear, that the huſband was not liable: that point was ſolemnly decided in the Court of King's Bench in a caſe which was tried before me at *Taunton* (*c*); there it appeared that the wife had been turned out of doors by her huſband, and afterwards committed adultery, but, before the cauſe of action accrued, had ceaſed to live in a ſtate of adultery, and had offered to return; and the Court held, that in conſequence of the woman having once gone off with an adulterer, the huſband was diſcharged for ever. Here therefore the huſband is not liable; and if the wife be not, ſhe ſtands in a moſt miſerable condition. How is ſhe to find the means of ſupporting herſelf? How is ſhe to procure even a joint of meat for her daily ſubſiſtence? She can obtain no credit, unleſs ſhe be liable for her debt: her ſituation would be melancholy in the extreme. But whether ſhe be ſtrictly liable or not, it appears that ſhe has

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(*a*) 1 *Salk.* 116. 2 *Salk.* 646.

(*b*) Vid. etiam *Smith* v. *Bramſton*; *Smith* v. *Frampton*: *Anonymous*, *Paſ.* 8 *Will.* 3. *B. R.* and *Smith* v. *Page*, 2 *Salk.* 644. *Sparks* v. *Spicer*, 2 *Salk.* 648. *Dunkly* v. *Wade*, 2 *Salk* 653. *Goſlin* v. *Willcock*, *C. B.* 2 *Wilſ.* 306. *Sampſon* v. *Appleyard*, *C. B.* 3 *Wilſ.* 272. *Allen and Another* v. Sir *John Peſhall* Bart. 2 *Black.* 1177. *Doe* v. *Williams*, *Cowp.* 622. *Farewell* v. *Chaffey and Others*, 1 *Burr.* 53. Dr. *Burton* v. *Thompſon*, 2 *Burr.* 664. *Foxcroft* v. *Duke of Devonſhire*, 2 *Burr.* 936. *Edmondſon* v. *Machell*, 2 *T. R.* 4. *Wilkinſon* v. *Payne*, 4 *T. R.* 468.—But if the Court had conſidered the verdict in the preſent caſe to be clearly wrong in point of law: *Qu.* whether a new trial would not have been granted? For in *Wilſon* v. *Raſtall*, 4 *T. R.* 753. it was ſaid by the Court, that there was no inſtance in which a new trial had been refuſed, where the verdict had proceeded upon the miſtake or miſdirection of the Judge.

(*c*) *Govier* v. *Hancock*, 6 *T. R.* 603.

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lived as a feme ſole, that ſhe has repreſented herſelf as ſuch, and has obtained credit under that character. The defence therefore is diſhoneſt and unconſcientious, and on that ground I think that the Court ought not to interpoſe.

Heath J. On the laſt point I agree with my Brother *Buller*, *viz.* that as the Defendant has lived and contracted as a feme ſole ſhe ought to be liable for her debts.

Rooke J. I am of the ſame opinion.

Williams took nothing by his motion (*a*).

(*a*) Vid. *De Gaillon* v. *L'Aigle*, *poſt*, *Nov.* 27th, and the caſes there cited.

Lloyd *v.* Johnson.

Nov. 24th.

Plaintiff was employed to waſh clothes for Defendant who was a proſtitute, knowing her to be ſuch; and held that the uſe to which the clothes might be applied, could not bar Plaintiff of an action for work and labour.

Indebitatus aſſumpſit for work and labour done, and on the common money counts. Plea, Non aſſumpſit.

At the trial before *Rooke* J. at the *Weſtminſter* ſittings in this term, it appeared by the evidence of a ſervant maid of the Defendant, (who was alſo a daughter of the Plaintiff,) that the Defendant was a proſtitute, and that this action was brought to recover the amount of a bill delivered for waſhing done by the Plaintiff's wife. By the bill of particulars it was ſhewn that the articles waſhed, conſiſted principally of expenſive dreſſes, and that there were alſo ſome gentlemen's night-caps; the witneſs ſwore that the former were for the purpoſe of enabling the Defendant to appear at public places, and that the latter were worn by thoſe perſons who ſlept with her miſtreſs. She alſo proved that the Plaintiff and his wife had full knowledge of the Defendant's ſituation, and of the purpoſes to which the articles in queſtion were applied. The learned Judge, on an objection taken to the Plaintiff's recovery under theſe circumſtances, was of opinion, that no ſuch immorality in the contract on the part of the Plaintiff had been proved, as ought to defeat the action. Verdict for the Plaintiff.

Cockell Serjt. now moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit be entered, and cited *Criſp* v. *Churchill*, *E.* 34 *Geo.* 3. *coram Eyre* Ch. J., where in an action for uſe and occupation of a lodging, it being ſet up that the Defendant was an infant and a proſtitute, the Chief Juſtice was of opinion that thoſe circumſtances were no bar to the action, as both an infant and a proſtitute muſt have a lodging; but it being ſhewn that the lodging was let to the Defendant for purpoſes of proſtitution, and with a knowledge on the part of the Plaintiff of that fact, he held that the action was not maintainable (*a*).

Buller J. What do you mean by the expreſſion of clothes uſed for the purpoſes of proſtitution? This unfortunate woman muſt have clean linen, and it is impoſſible for the Court to take into conſideration which of theſe articles were uſed by the Defendant to an improper purpoſe, and which were not. As to the caſe before my Lord Chief Juſtice, I ſuppoſe the lodgings were hired for the expreſs purpoſe of enabling two perſons to meet there, which would certainly be unlawful. Here the Plaintiff's wife was employed generally to waſh the Defendant's linen, and the uſe which the Defendant made of it cannot affect the contract.

Heath and **Rooke** Juſtices being of the ſame opinion,

Cockell took nothing by his motion.

(*a*) Vid. etiam *Girarday* v. *Richardſon*, *Eſpin. Caſ. N. P.* 13., where the ſame point was ruled by Lord *Kenyon*, at the *Weſtminſter* ſittings after *Eaſter* term 33 *Geo.* 3.

White *v.* Dent.

Nov. 24th.

Plaintiff cannot ſign judgment for want of a plea, without demanding one; though Defendant has not taken the declaration out of the office.

The Plaintiff having filed his declaration, the Defendant appeared, but never took the declaration out of the office: when the time for pleading was out, the Plaintiff ſigned judgment without having demanded a plea.

A rule *niſi* having been obtained to ſet aſide this judgment for irregularity,

Clayton Serjt. now ſhewed cauſe, and contended that if the Defendant does not take the declaration out of the office no demand of a plea need be made, for if the Defendant pleads without having taken the declaration out of the office, his plea is a nullity (*a*).

Shepherd Serjt. *contrà* urged, that the Defendant is not bound to take the declaration out of the office till he actually pleads.

The Court, on inquiry of the officers as to the practice, having found a difference of opinion, ſaid, that although the Defendant muſt take the declaration out of the office before he pleads, yet that as he may take it out the very hour before he pleads, the Plaintiff ought not to ſign judgment without demanding a plea.

Rule abſolute without coſts.

(*a*) *R. T.* 12 *Will.* 3. *B. R.* *R. M.* 10 *Geo.* 2. *B. R.* *Keeling* v. *Newton*, *B. R.* 1 *Wilſ.* 173.

Nov. 24.

Davis, one, &c. Aſſignee of the Sheriff, *v.* Owen and Thomas.

Though there be not 15 days between the *teſte* and return of a *capias*, yet it is amendable. If a *capias per continuance* be *teſte*'d on the ſame day as the original *capias*, a new original *capias* may be ſued out to warrant it, though ſuch new original bear *teſte* before the cauſe of action accrued. Taking out a ſummons before a Judge to ſtay proceedings on the bail-bond, is a waver of an irregularity in the notice of declaration.

An attachment of privilege at the ſuit of the Plaintiff, returnable on the Morrow of *All Souls*, having iſſued againſt the Defendant *Owen* and one *Michael Hughes*, *Owen* on the 8th *November* put in bail with the Filizer, and immediately gave the Plaintiff notice thereof. *Hughes* left the kingdom. The Plaintiff finding that the Defendant *Owen* had by miſtake put in his bail with the Filizer inſtead of the Prothonotary (with whom in attachments of privilege bail ſhould be put in) waited till the expiration of the time for perfecting bail, then took an aſſignment of the bail-bond, and ſued out a *capias ad reſpondendum* upon it againſt the preſent Defendants, *teſte*'d the 6th *November*, returnable the 18th *November*, with a copy of which the Defendant *Thomas* was ſerved: but *Owen* not having been ſerved with it, the Plaintiff ſued out a *capias per continuance*, alſo *teſte*'d 6th *November*, with a copy of which *Owen* was ſerved. A notice was delivered to the Defendant *Thomas* of a declaration againſt him only. On the 20th *November* bail in the original action were put in for the Defendant *Owen* with the Prothonotary.

A rule *niſi* was obtained on a former day to ſet aſide the proceedings on the bail-bond for irregularity, on three grounds: 1ſt, Becauſe there were not fifteen days between the *teſte* and return of the original *capias:* 2dly, Becauſe the *capias per continuance* was *teſte*'d on the ſame day as the original *capias*, whereas it ſhould have been *teſte*'d on the return-day of ſuch *capias:* 3dly, Becauſe the writ was joint againſt *Owen* and *Thomas*, and the notice of declaration ſeveral againſt *Thomas* only.

Marſhall Serjt. this day ſhewed cauſe, and contended, 1ſt, that the *capias* was amendable (*a*), *Carty* v. *Aſhley*, *C. B.* 3 *Wilſ.* 454. 2 *Bl.* 918. *S. C. Bourchier* v. *Wittle*, 1 *H. Bl.* 291. 2dly, That a *capias per continuance* may bear *teſte* on any day; or that if neceſſary a new original *capias* may be ſued out, bearing *teſte* ſuch a day as will warrant the *capias per continuance*, in the ſame manner as an original *capias ad ſatisfaciendum* may be ſued out, where a Defendant has been taken on a *capias ad ſatisfaciendum* iſſued into

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(*a*) Vide tamen *Williams* v. *Faulkner*, *Barnes*, 409. ed. 3. *Atkinſon* v. *Taylor*, 2 *Wilſ.* 117. *Barnes*, 427. *S. C. Holt* v. *Hawkes*, *Barnes*, 420. ed. 3. and *Whale* v. *Fuller*, 1 *H. Bl.* 222.

a different county from that in which the action is brought (*a*). 3dly, That if there were any irregularity in the notice of declaration, the Defendant had waved it by taking out a ſummons before a judge to ſtay proceedings on the bail-bond, on the uſual terms. He ſtated that the Plaintiff would not have taken an aſſignment of the bail-bond for the Defendant's miſtake in putting in bail, but to prevent the expence of being obliged to proceed to outlawry againſt *Hughes*, who had fled the kingdom.

Le Blanc Serjt. *contrà*, inſiſted, 1ſt, that the power of amendment being diſcretionary in the Court, they would not exerciſe that power in favour of the Plaintiff in a caſe of ſuch ſharp practice as the preſent. 2dly, That it is abſurd for the *capias per continuance* to bear *teſte* on the ſame day as the original command, and that if ſuch a new original *capias* as was ſuggeſted by the other ſide were ſued out, it would bear *teſte* before the cauſe of action accrued. 3dly, That no irregularities, which could be taken advantage of when the parties went before the Judge, were waved by that application, the object of which was the ſame as that now before the Court.

Buller J. The firſt objection is of no weight, for it clearly appears by authorities that the Court will alter a *capias* ſo as to make fifteen days between the *teſte* and return. Here a miſtake was committed by the Defendant in putting in his bail; and in ſtrictneſs I cannot ſay that the aſſignment of the bail-bond was irregular, but as the Plaintiff had notice that the bail were put in, I think it was ſuch ſharp practice on his part, as to juſtify the Court in finding ſome means to prevent him from getting his coſts by it. The ſecond objection is to the *capias per continuance*, but an original *capias* may be ſued out to warrant that; and it will be no objection to ſuch original *capias* that it will bear *teſte* before the cauſe of action accrued (*b*). I have often talked with the late Mr. Juſtice *Gould* on this ſubject, who went great lengths in amending writs of *capias*, and his reaſon was, that as a writ of *capias* never appears on the record, it is of no conſequence whether it bear *teſte* before or after the cauſe of action accrued; and if a *latitat* may be ſued out (as it certainly (*c*) may) before the cauſe of action accrues, and a *capias* may not, the courts of King's Bench and Common Pleas are not on an equal footing. As to the third objection, it

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(*a*) *Shaw* v. *Maxwell*, 6 *T. R.* 450.

(*b*) 1 *Crompton's Pr* 25. *Imp. Pr. C. B.* 154. ed. 4. Sed vide 1 *Sellon's Pr.* 83. ed. 2.

(*c*) *Johnſon and Another* v. *Smith*, 2 *Burr.* 962, 7. *Foſter* v. *Bonner*, *Cowp.* 454. and *Beſt* v. *Wilding*, 7 *T. R.* 4.

has

1798.

DAVIS *v.* OWEN.

has been held that taking any ſtep in a cauſe, as appearing (*a*), is a waver of any irregularity. Now it does ſeem that the taking out a ſummons in this caſe was a ſtep; for unleſs the Defendant was ſerved with a writ in conſequence of which he was obliged to appear, why ſhould he go before a Judge to be relieved? By ſo doing he allows that he has been ſerved with proceſs to which he ought to be anſwerable. The only thing to be conſidered is, on what terms the Court ſhould ſtay proceedings on the bail-bond. Now as the practice on the part of the Plaintiff has been ſo exceedingly ſharp, I think the order ſhould be to ſtay proceedings on the bail-bond without coſts, the Defendant *Owen* undertaking not to plead in abatement that *Hughes*, who has fled the kingdom, is not joined in the declaration.

And in this way the Court made

The rule abſolute.

(*a*) *Fox and Another* v. *Money*, widow, *ante*, 250.

Nov. 24.

DYER, Demandant, *v.* BULLOCK and Others, Tenants.

The 8 & 9 *W.* 3. *c.* 31. *ſ.* 1. which directs the form to be purſued in a writ of partition, applies only to caſes where the tenant does not appear.

SHEPHERD Serjt. having obtained a rule to ſhew cauſe why proceedings on a writ of partition ſhould not be ſtayed, on the ground of a notice of the writ, with a copy thereof, not having, according to the directions of the 8 & 9 *Will.* 3. *c.* 31. *ſ.* 1. been ſerved forty days before the return:

Le Blanc Serjt. ſhewed cauſe, and obſerved that the 8 & 9 *Will.* 3. *c.* 31. *ſ.* 1. only applies to caſes of ſigning judgment (*a*) by default for want of appearance, whereas here the tenants had appeared.

Shepherd admitted the conſtruction of the ſtatute to be againſt him,

And the Court being of the ſame opinion

Diſcharged the rule.

(*a*) Vid. *Halton* v. *The Earl of Thanet*, 2 *Bl.* 1134.

Nov. 24.

WYATT and Others *v.* SMEE.

An affidavit to hold to bail, ſtating "that *J. S.* "has made "no tender to pay in notes of the Bank of *England*" excludes the poſſibility of any other perſon having tendered for him, and ſufficiently complies with 37 *Geo.* *c.* 45. *ſ.* 9.

LE BLANC Serjt. moved for a rule to ſhew cauſe why the Defendant ſhould not be diſcharged out of cuſtody on filing common bail on an objection to the affidavit to hold to bail, in which it was ſworn that "no tender was made *by the ſaid J. Smee* to pay in notes "of the Bank (*a*) of *England*," whereas it ſhould have been ſworn generally that no tender was made; for though *J. Smee* might have made no ſuch tender, yet it might have been made by ſome other perſon for him, conſiſtently with the affidavit.

Buller J. If any other perſon had made an offer *for* the Defendant, it would have been an offer *by* the Defendant.

Le Blanc took nothing by his motion.

(*a*) Vid. 37 *Geo.* 3. *c.* 45. *ſ.* 9.

BELL and Others *v.* GILSON.

Nov. 26th.

If the name of the broker effecting a policy of inſurance be inſerted in the policy as "agent," it is a ſufficient compliance with the 28 *Geo.* 3. *c.* 56. Goods, the produce of *Holland*, purchaſed in that country during hoſtilities between *Holland* and *Great Britain*, by a *Britiſh* agent reſident there, and ſhipped for *Britiſh* ſubjects, were inſured by them in this country; held, that this was a legal inſurance.

THIS was an action on a policy of aſſurance underwritten by the Defendant on the 8th *December* 1797, for 200 *l.*, on goods ſhipped on board the *Elizabeth*, Captain *Spewee*, from *Rotterdam* to *Hull*, at a premium of two guineas and a half *per Cent.* The firſt count of the declaration ſtated that the Plaintiffs cauſed to be made the policy of aſſurance, purporting thereby and containing therein that *Barrett* and Co. *agents*, the names of *Barrett* and Co. being the uſual ſtyle and firm of dealing of the perſons reſiding in *Great Britain*, who received the order for and effected the ſaid policy of aſſurance, as well in their own names as for and in the name and names of all and every other perſon or perſons to whom the ſame did, might, or ſhould appertain, in part or in all, did make aſſurance, &c.; and the ſaid firſt count averred the intereſt to be in the Plaintiffs, and that the inſurance was made on their account, and for their uſe and benefit; that the ſhip ſailed on the voyage inſured with the goods on board, and that in the courſe of that voyage ſhe was captured by the *French*, and the goods and the voyage loſt. There were alſo counts for money had and received, and money paid. The Defendant pleaded the general iſſue *non aſſumpſit*, on which iſſue was joined; and paid the premium into court on the count for money had and received.

This cauſe came on to be tried by a ſpecial jury at the laſt ſitting in *Trinity* term at *Guildhall*, before *Eyre* Ch. J., when a verdict was found for the Plaintiffs for 194 *l.* 15 *s.*, ſubject to the opinion of the Court on the following caſe.

The Plaintiffs, being *Britiſh* merchants reſident in *London*, gave orders to Meſſrs. *Barrett* and Co. inſurance-brokers (alſo reſident in *London*) to effect the policy in queſtion, who as brokers effected the ſame in their own name and uſual firm of *Barrett* and Co., deſcribing themſelves therein *agents*. The ſhip *Elizabeth* was a neutral veſſel belonging to *H. Bauerman* and Son, of *Greetſyl* and *Embden* in *Pruſſia*, bound on the voyage inſured from *Rotterdam* to *Hull*, on which ſhe ſailed, and was captured as ſtated in the declaration; and the Plaintiffs had goods on board her for the voyage inſured of greater value than the amount inſured. The ſaid goods, conſiſting of ſixty caſks of madders, were purchaſed for the Plaintiffs, and on their account, at *Rotterdam*, by *Robert Twiſs* their agent reſident there. When the goods were purchaſed on the Plaintiffs' account, and alſo at the time of the ſhipping and capture thereof, and when the ſaid inſurance was made, open hoſtilities had commenced and then exiſted between *Great Britain* and the perſons exerciſing the powers of government in the United States. During all that time it was and is the conſtant practice to enter goods at the Cuſtom-houſe direct from *Holland*, and was never impeded, though the officer at the Cuſtom-houſe knew whence they came, as he always inquired whether they were aliens or neutrals, on account of the alien duty.

The queſtions for the opinion of the Court were, 1ſt, Whether the name of *Barrett* and Co. agents, inſerted in the policy, were a ſufficient compliance with the ſtat. 28 *Geo.* 3. *c.* 56.? 2dly, Whether the ſaid inſurance on the ſaid goods were legal?

Heywood Serjt. for the Plaintiffs. The firſt queſtion in this caſe is, whether this policy, effected in the name of *Barrett* and Co. as agents, has ſufficiently complied with 28 *Geo.* 3. *c.* 56.? As this point, however, has been decided in the courſe of this term, not only in this court (*a*), but alſo in the court of King's Bench (*b*), I ſhall leave it without any further argument, and paſs to the ſecond queſtion, *viz.* whether an inſurance on goods purchaſed by

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a *Britiſh* ſubject in an enemy's country, and ſhipped for this country on his own account in a neutral veſſel, be legal? Suppoſe the property in diſpute to have belonged to the Plaintiff before the commencement of the preſent war, will it be contended that in ſuch caſe he would be precluded from bringing it home? Whatever may be the objection to allowing *Britiſh* ſubjects to export goods, on the ground of ſuch exportation being of aſſiſtance to the enemy, there is no policy which forbids him to bring goods from thence, as that tends to diſtreſs the enemy. It is not laid down as a general propoſition in *Grotius*, *Puffendorf*, or *Vattel* that commerce is prohibited between powers at war. There may be ordinances of particular countries to this effect, ſuch as that of *Barcelona* (*a*), of the year 1484, cited in *Briſtow* v. *Towers*, 6 *T. R.* 45., and though *Valin*, tom. 2. p. 31., ſays, that every declaration of war contains a prohibition of commerce, yet it appears from the next paragraph, p. 32., in which he relies on the ordinances of *France* of the years 1543, art. 42. and 1584, art. 69., that his obſervation muſt be confined to the law of his own nation: and this is confirmed by a paſſage in *Emerigon*, *Traité des Aſſurances*, tom. 1. p. 128., from which it appears that the declarations of war iſſued by the Kings of *France* always contained an expreſs prohibition of commerce with the enemy. Indeed if the declarations of war iſſued by this country had uſually contained the ſame prohibition, it would not affect this caſe, ſince the preſent war with *Holland* commenced under a proclamation for general repriſals only. With reſpect to the law of *England*, Lord *Mansfield*, in *Giſt* v. *Maſon*, 1 *T. R.* 85., ſaid, that he knew of two caſes only in which a ſubject had been prohibited from trading with the enemy. The firſt of thoſe caſes (*viz.* 2 *Roll. Abr.* 173. *Prerogative* (L), *Guerre*, where trading with *Scotland*, then in a general ſtate of enmity with this kingdom, was held illegal) goes much farther than this, for the party there not only bought of the enemy, but ſold to him: and the ſecond was a caſe of corn carried by a ſubject of this country to the enemy; now corn is clearly a contraband article in time of war; for, though the commencement of hoſtilities does not create a prohibition of all commerce with enemies, yet it does of ſuch commerce as may be the means of affording them aſſiſtance. [*Heath* J. In the caſe in *Roll. Abr.* the keepers of the truce permitted two perſons to go into *Scotland*, which was clearly illegal in

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them, for by ſo doing they exceeded their authority, as information might thereby have been given to the enemy. The ſecond caſe cited by Lord *Manſfield* happened in time of famine (*a*), and probably a proclamation had iſſued prohibiting the exportation of corn (*b*).] In *Henkle* v. *The Royal Exchange Aſſurance Company*, 1 *Vez.* 320. Lord *Hardwicke* obſerved that it might be going too far to ſay that all trading with enemies is unlawful. With reſpect to the caſes of *Brandon* v. *Neſbitt*, 6 *T. R.* 23. and *Briſtow* v. *Towers*, 6 *T. R.* 35., it is ſufficient to ſay that the actions in thoſe caſes were brought in favour of alien enemies: and it is clear that the deciſions proceeded only on the ground of a diſability in the Plaintiffs at the time of the action brought, ſince Lord *Kenyon* in *Brandon* v. *Neſbitt*, when commenting on the caſe of *Ricord* v. *Bettingham*, 3 *Burr.* 1734, and 1 *Bl.* 563. *S. C.*, where it was held that an action by an enemy might be maintained on a ranſom bill, obſerved that the action there was not brought until peace was reſtored. It is certain that the Legiſlature of this country has not conſidered hoſtilities as amounting to a general prohibition of importing articles from the enemy's country, ſince it has been thought neceſſary in every war from the reign of *Charles* the Second to this time, to paſs acts of parliament (*c*) for prohibiting or regulating the importation of particular articles during particular periods, which would not have been requiſite, if ſuch trade had been already prohibited *in toto* and for ever.

Williams Serjt. for the Defendant. 1ſt, The caſe of *De Vignier* v. *Swanſon* is diſtinguiſhable from this, ſince the brokers who effected the policy there were the general agents of the Plaintiff, whereas here *Barrett* and Co. were only employed in this particular tranſaction; the ſame obſervation will apply to *Wolff* v. *Horncaſtle*, where that fact was much relied on by the Court. A mere broker is not within the words of the 28 *Geo.* 3., for he is neither the perſon intereſted, the conſignor, the conſignee, the perſon giving the order for inſurance, nor the perſon receiving it from thoſe who are intereſted. By the expreſſion "as agents," uſed in this policy, the underwriter has been deceived, ſince he may have been led to ſuppoſe that *Barrett* and Co. were the gene-

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(*a*) This appears from *Park's Inſur.* 238. which is founded on the manuſcript note of *Giſt* v. *Maſon*, cited in the margin of the ſame book, p. 242. *a*.

(*b*) Which would bring the caſe within the principle of *Delmada* v. *Motteux*, *Park's Inſur.* 234.

(*c*) See theſe acts collected in the argument of *Briſtow* v. *Towers*, 6 *T. R.* 40, 1, 2, 3, 4.

ral agents of the Plaintiffs, which they do not appear to have been. 2dly, The ſuppoſition of this property having belonged to the Plaintiff before the commencement of the war, is excluded by the caſe. It is eſtabliſhed by *Briſtow* v. *Towers* that the inſurance of enemy's property is illegal; and though the judgment in that caſe appears to have been given with reference to *Brandon* v. *Neſbitt*, yet they were different; for as there was a plea of alien enemy in the one and not in the other, we muſt conclude that *Briſtow* v. *Towers* was decided on the illegality of the trade. With reſpect to the policy of the queſtion, this caſe is ſtronger than the two above-mentioned deciſions; for if it be not lawful for an enemy to ſpend his money here to the advantage of this country, it certainly cannot be lawful for a *Britiſh* ſubject to enrich the enemy by purchaſing his goods. By the caſe in 2 *Roll. Abr.* 173. *Prerogative* (L), *Guerre*, it diſtinctly appears that it is illegal for an *Engliſhman* to traffic in the enemy's country. The commencement of hoſtilities puts an end to all amity and commerce (*a*). If this neutral veſſel had been captured by an *Engliſh* ſhip of war, though the veſſel would have been reſtored to the owners, it is clear, both from the general practice of the Court of Admiralty, and from the expreſs deciſion by the Lords Commiſſioners of Appeal, in the *Louiſa Margaretha*, Henſlop, 3d *April* 1781, that the goods would have been condemned as lawful prize (*b*).

Heywood

(*a*) *Bynk. Quæſ. Juriſ. Pub. lib.* 1. *c.* 3. p. 197. fol. ed. 1767.

(*b*) *John Kirkpatrick Eſcott* of *London*, *Claimant* and *Appellant*, againſt *Henry Smedley*, *Captor* and *Reſpondent*. (See printed Proceedings in the Court of Appeal, from which the following ſtatement is abridged.)

Kirkpatrick, *Eſcott*, and *Reed*, of *London*, for many years previous to the commencement of hoſtilities between *Great Britain* and *Spain*, in 1779, traded to *Malaga*, and had an eſtabliſhed houſe there: at which place *Eſcott*, one of the partners, reſided, till within ten months previous to the war. On his leaving *Malaga* conſiderable quantities of wine and other merchandize belonging to the houſe, and depoſited in vaults and warehouſes ſet apart for the ſame, were left in the hands of one *Henry Grivegnee*, a *Fleming* by birth, and brought up in the houſe, who was ſuffered to remain at *Malaga* as agent for the partners, for the purpoſe of preſerving the wines for them during hoſtilities, with directions to remit them to *London* if a favourable opportunity ſhould offer, and to act under the firm of *Grivegnee* and Co. Part of the cargo claimed conſiſted of wines taken from the above-mentioned ſtores, and the reſidue (with the exception of two cheſts of hams, which were a preſent from *Grivegnee*) of goods, the produce of *Spain*, purchaſed by *Grivegnee*, for the partners, and by their order. Theſe goods were ſhipped on 7th *April* 1780, by *Grivegnee*, on board the *Louiſa Margaretha*, a *Dutch* ſhip, furniſhed with a paſs or ſea-brief according to treaty, for the ſole purpoſe of being remitted to the partnerſhip; but to prevent its being known in *Spain* that they were the property of *Engliſhmen*, it was expreſſed in the bills of lading that they were ſhipped on neutral account and riſk, and to be delivered at *Oſtend*, for which port the ſhip was chartered and cleared out. *Grivegnee* was to receive 14 *per cent.* on the goods remitted, but no perſon whatever except the three

partners

Heywood in reply. The caſes of *Brandon* v. *Neſbitt* and *Briſtow* v. *Towers* muſt both be conſidered as having proceeded on the

partners in *London* was intereſted in them. The ſhip ſet ſail on the 11th of *April* from *Malaga*, but being obliged to put back, *Grivegnee*, before ſhe could ſail again, received a letter from the partnerſhip, ordering him to ſend the ſhip direct to *London*, under the expectation of her being protected by the *Levant* bill [1] then pending in parliament. She accordingly ſailed direct for *London* on the 21ſt *April*; and on the 15th *May* was captured by a *Britiſh* privateer near the *Engliſh* coaſt. On the 1ſt of *June* 1780 the Court of Admiralty, by conſent of the parties, reſtored the ſhip, reſerving the adjudication of the cargo; but on the 8th *July* following condemned it as lawful prize. From this determination there was an appeal to the Lords Commiſſioners.

Reaſons for the Appellant.

1ſt, For that it is ſufficiently proved that the goods claimed were at the ſhipping and capture thereof the ſole property of Meſſrs. *Kirkpatrick* and Co. *Britiſh* ſubjects, who had no other means of conveying them with ſafety from *Spain*.

2d, For that the order of Council ſuſpending the *Dutch* treaty bears date the 17th of *April* 1780, and the ſhip laſt ſailed from *Malaga* the 21ſt of the ſame month, ſo that it was impoſſible for Meſſrs. *Kirkpatrick* and Co. to have countermanded the voyage, and that undoubtedly Mr. *Grivegnee* had reckoned on the peculiar privileges enjoyed by the States General of the United Provinces reſpecting their trade and navigation in time of war, and it is ſubmitted that the Judge of the Admiralty Court has conſtrued the ſuſpenſion directed by the ſaid order of Council as referring to the times and places of capture; whereas, as is alſo ſubmitted, that reference was intended to be had at the time of the ſhip's departure from the ports of loading; for that otherwiſe the avowed object of delay in the ſuſpenſion by the ſaid order, to wit, *from a regard to the intereſt of individuals, and a deſire to prevent their ſuffering by any ſurpriſe*, would not be anſwered, inaſmuch as it is impoſſible (as was the caſe in the preſent voyage) to direct the alteration of the voyage, which had been already begun.

3d, For that the *Levant* trade bill (which paſſed previous to the arrival of this ſhip in *England*) authorized the importation of ſuch goods direct from the *Mediterranean* in neutral ſhips; and that this was the intention of the Legiſlature in paſſing this act is manifeſt, inaſmuch as the act, which was not paſſed till the month of *June* 1780, had retroſpect to the 1ſt of the preceding *January*, in order to comprehend many cargoes, the produce of *Spain*, within the Streights of *Gibraltar*, (which, in expectation that the act would have paſſed ſooner than it did,) had been imported by *Britiſh* ſubjects in foreign veſſels, (and in every reſpect under the ſame circumſtances with this cargo,) and depoſited by an order of the Lords of the Treaſury in the King's warehouſes, on bond that they ſhould be either re-exported in a limited time, if the act ſhould not paſs, or pay the duties if it ſhould; and when the act had paſſed, they were admitted to an entry accordingly; and ſince that period the produce of *Malaga*, and other ports of *Spain* within the *Mediterranean*, has continued to be imported directly from the places of their growth, in foreign veſſels, in virtue, as is underſtood, of the ſaid *Levant* trade bill.

Reaſons for the Reſpondent.

1ſt, Becauſe after actual hoſtilities between two ſtates, and the iſſuing of letters of general repriſals, all trade and intercourſe between the ſubjects of thoſe ſtates is illegal, even though no expreſs prohibition of trade ſhould be iſſued, becauſe every ſubject is by virtue of his allegiance obliged to aſſiſt his King and diſtreſs the enemy to the utmoſt of his abilities, and not to aid or aſſiſt them either by trade or otherwiſe.

2d, Becauſe if *Britiſh* merchants were permitted in time of war to import goods into this kingdom immediately from and the produce of the territories of the enemy, under a pretence that the articles imported were ſuch as were their property and depoſited in their warehouſes prior to hoſtilities, it would operate to a very alarming degree; their warehouſes might be conſtantly ſupplied by their agents during the whole war, and a continual and extenſive trade might

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[1] 20 *Geo.* 3. c. 45.

be

the ſame principle, *viz.* that an action cannot be maintained in favour of an alien enemy: that having been expreſsly ſtated as the ground of the former deciſion, and the Court having profeſſed in the latter caſe to be governed by the authority of the former. The caſe cited from the *Cockpit* may have been determined on two grounds very different from thoſe on which this caſe reſts. 1ſt, The goods at the time of the capture might have been conſidered as belonging to perſons *inhabiting* in *Spain*: for though the Plaintiffs themſelves were reſident in *London*, they had a partner (*a*) reſident at *Malaga*, where the houſe of buſineſs was continued. Which brings the caſe within the command of the proclamation for repriſals, "to ſeize the goods of all perſons *inhabiting* within the enemy's "ſtate." 2dly, As the bills of lading were made out to *Oſtend*, which was not the real port of diſcharge, the documents were fraudulent. With reſpect to the policy of allowing the trade in queſtion, ſince it is ſtated in the caſe to be uſual for the Cuſtom-houſe to permit goods to be imported under circumſtances ſimilar to the preſent, this ſort of trade is at leaſt allowed by the Government of the country, who muſt be preſumed to be the beſt judges of the mere policy.

BULLER J. (after ſtating the caſe). On this caſe two queſtions have been raiſed; 1ſt, whether the policy which is deſcribed to

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be carried on, to the very great benefit and ſupport of the enemy.

3d, Becauſe in this caſe, beſides the wines claimed by the appellant, as having been his property, and depoſited in his warehouſes in *Spain* prior to hoſtilities, there is a conſiderable quantity of other goods claimed by him as his property, and as having been bought in *Spain* by his orders ſince the commencement of hoſtilities; which avowal of a trade ſo repugnant to his duty as a *Britiſh* ſubject will, it is hoped, not only warrant the ſentence of condemnation of the property claimed, but ſubject the claimant to exemplary coſts.

4th, Becauſe the *Levant* act, on which Mr. *Eſcott* the appellant, ſeems in a great meaſure to reſt his cauſe, is not applicable to the preſent caſe, ſuch act being calculated only to permit an importation into *Great Britain* from neutral ports, and in neutral bottoms, of ſuch goods as could not before have been imported in any other than *Britiſh* ſhips, but not to give any countenance or warrant to the ſubjects of *Great Britain* to carry on a trade directly or indirectly with the enemy, in a neutral ſhip from a neutral port, and much leſs from an enemy's port to the port of *Great Britain*.

On the 23d of *April* 1781 the Lords Commiſſioners of Appeal (preſent Earl *Bathurſt*, Preſident of the Council; Earls *Sandwich*, *Marchmont*, *Hillſborough*, *Clarendon*; Viſcount *Stormont*; Lords *Grantham*; *Loughborough*, Ch. J. of the Common Pleas; and Sirs *Richard Worſley* and *John Goodricke*) affirmed the decree of the Court of Admiralty.

See alſo the caſe of the *Saint Elizabeth*, Lauritz, 29th *June* 1749; the *Comte Wohrenzorff*, Willers, 18th *July* 1781; the *Fortuna*, Kock, 27th *June* 1795; and the *Freeden* otherwiſe *Vreede*, Backman 4th *July* 1795, in the ſame Court. To which may be added what was ſaid by Lord *Manſfield* in *Giſt* v. *Maſon*, 1 *T. R.* 85. *viz.* "By the maritime "law, trading with an enemy is cauſe of "confiſcation in a ſubject; but this does not "extend to a neutral veſſel."

(*a*) *Quære tamen.* See the caſe *ſuprà*.

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have been made by *Barrett* and Co. as agents ſufficiently complies with the 28 *G.* 3.? I think this queſtion ought now at leaſt to be quite at reſt, two deciſions having been already made upon this ſubject within the term; one in this court, and one in the King's Bench; both of which are directly in point. It may be material to remember, that previous to the paſſing of the 25 and 28 *G.* 3. many objections were made by the merchants, that policies in their frame were ſo looſe and incorrect, that an underwriter had no opportunity of knowing the nature of the thing inſured, or who the perſons were for whom he inſured. Great inconvenience aroſe, as appears by the preamble of one of the ſtatutes (*a*) from the circumſtance of many policies being made in blank, in conſequence of which the underwriters were not led to the knowledge of any of the parties. I remember it was the converſation both in *Weſtminſter-hall* and out of that place, that the underwriters wanted to know the name of ſomebody concerned, though it was not ſo material who that perſon ſhould be. And why was this? It was becauſe though they might not know the name of the principal, yet if they were in poſſeſſion of the name of the perſon who brought forward the policy, they might have ſome confidence, that if that perſon was a merchant of character, or a reſpectable broker, he would not be engaged in a diſhoneſt tranſaction: ſuch as I remember to have been not unfrequent in the courſe of laſt war; *viz.* the inſurance of ſhips and cargoes, which were only carried out for the purpoſe of being ſunk. In this caſe the wiſh of the underwriters has been complied with, as well as what the Legiſlature thought fit to direct; for the name of the perſon immediately employed to effect the policy has been inſerted. The caſe in the King's Bench goes farther than this, for there it was not even ſtated in the policy that the parties were *agents*, but only averred in the declaration that they were ſo; whereas here it is expreſsly ſaid in the policy that *Barrett* and Co. effected the policy "as agents," by which is imported that they acted not on their own account, but on the part of ſomebody for whom they were concerned. The ſecond queſtion is, whether this policy on goods being *Engliſh* property, purchaſed ſince the commence-

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(*a*) 25 *Geo.* 3. *c.* 44. Whereas it hath been found by experience that the making or effecting inſurances on ſhips or veſſels, and on goods, merchandizes, and effects in blank, and without ſpecifying therein the name or names of any perſon or perſons for whoſe uſe and benefit, and on whoſe account ſuch inſurances are made and effected, hath been in many reſpects miſchievous, and productive of great inconveniences, for remedy, whereof be it enacted, &c.

ment of hoſtilities, and ſhipped at *Rotterdam*, be legal or not? Now in the firſt place, I take it to be extremely clear, that this is not an inſurance on enemy's property, and that we have nothing to do with that conſideration here. Let us ſee what the caſe does ſtate. It ſtates that the goods were purchaſed for the Plaintiff at *Rotterdam* by his agent. But whoſe goods they were before they were ſo purchaſed is not mentioned. They might have been the property of *Danes* or *Swedes*, and then no objection could be made: or they might have been the property of an *Engliſhman*; for it appears by the caſe, that the Plaintiff's agent in *Holland* was an *Engliſhman*; and if an *Engliſhman* could buy goods in *Holland*, why could not an *Engliſhman* alſo ſell goods there; and if theſe goods were bought of an *Engliſhman*, it is perfectly immaterial whether they were purchaſed in *England* or in *Holland*. I cannot diſtinguiſh this from the caſe put by my Brother *Heywood*. Suppoſe an *Engliſhman*, at the commencement of hoſtilities, to have goods in an enemy's country; may he not bring them away? In ſuch caſes a time is generally limited for the ſubjects of the ſtate againſt which hoſtilities are commenced, to leave the country; and will it be ſaid, that during that time, they may not carry away their goods? But I will go one ſtep further. I will ſuppoſe that the party has ſtolen theſe goods; and that being in poſſeſſion of them at the time of the policy made, he wants to bring them home. The underwriter will have no right to go into the ſtate of the property previous to the time when he inſured. Suppoſe certain requiſites to have been neceſſary, by the law of *Holland*, to make a good ſale in *Holland*, ſhall the underwriter ſay that the goods were not ſold according to the law of *Holland*? Or if they were ſeized by a pirate, and ſold by him to the Plaintiff, ſhall the underwriter ſet up that as a defence? Theſe caſes are too monſtrous to bear conſideration. What is the nature of the contract of inſurance? It proceeds on this ground, that a party being poſſeſſed of goods which he wiſhes to bring home deſires to divide the riſk with other perſons. Whether the goods were improperly ſold to him or not, provided he has paid the value, he is intereſted to the amount of them: and ſhall he not inſure them? The underwriter cannot be permitted to go beyond the time when the goods were ſhipped. It has however been contended, that the ſubjects of this realm ſhall not bring home their own property from an enemy's country. Nothing but poſitive authority would warrant the Court

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in laying that down as law. If the ſubjects of this country have goods in an enemy's country, it is moſt clearly for the intereſt of this country that they ſhould be able to bring them home. Independent of caſes, we all know how frequently this ſubject has been canvaſſed. If we look into the Parliamentary Debates in 1746 and 1747, we ſhall ſee that Sir *Dudley Ryder*, Lord *Manſfield*, and the other great men of that time, argued the queſtion entirely on its expediency, and held that it was good policy to permit inſurances on enemy's property. In later times I well remember to have ſeen many policies tried profeſſedly on enemy's property, without ever hearing the objection raiſed. Lord *Manſfield* did all in his power to prevent ſo diſhonourable a defence being made. When the caſe of *Giſt* v. *Maſon* came on, I more than once converſed with Lord *Manſfield* on the ſubject, being deſirous to obtain his opinion on the legality of ſuch inſurances. On the legality however, I never could get him to reaſon. He often ſaid that in former times it was conſidered for the intereſt of the country to inſure enemy's property, and on the perſuaſion of its being for the intereſt of the country, he always diſcountenanced any objection on that head. But he never went beyond the ground of expedience. At preſent I think ſuch inſurances are not expedient; the ſtate of the countries at war is ſuch as to make them otherwiſe. But the underwriters have taken care that ſuch a caſe as this ſhall never ariſe again; for from the moment that any one underwriter ſucceeded on this kind of defence, there was an end of inſurance on enemy's property. It is not however neceſſary to go into the ground of expedience: the illegality of ſuch underwriting is now pretty well ſettled (*a*). The caſe cited from the *Cockpit* does not ſtrike me as governing this. We have ſo looſe an account of it, and are ſo much left to gueſs at the grounds on which the judgment was founded, that it can have no effect here. Indeed a very ſufficient anſwer has been given to it, by obſerving that the documents appear to have been fraudulent. But let us ſee whether there are not other grounds on which it might have proceeded. In time of war ſubjects of *Great Britain* have an agent ſettled and permanently reſident at their houſe of buſineſs in *Spain*, are dealing in articles of the produce of *Spain*, and are carrying on trade in order to make a profit of thoſe goods, which is a very different caſe from this. Here no profit goes to the

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(*a*) Vide *Park. Inſur.* 239. 243.

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enemy. There a queſtion might have ariſen, whether ſome of the partners, being reſident in this country, ſhould ſave the goods purchaſed by the houſe abroad; on which queſtion conſiderable doubts might be entertained, nor am I now prepared to give an opinion upon it. Being therefore ſo little informed of the grounds of the deciſion at the *Cockpit*, and conſequently not at all governed by it, I think it clear that this Plaintiff is entitled.

Heath J. I am of the ſame opinion. With reſpect to the firſt point, as two deciſions have already been made on the ſubject in this term, one in this Court, and one in the King's Bench, it will not be neceſſary to ſay any thing. The ſecond point turns on this queſtion, whether the goods of a *Britiſh* ſubject purchaſed in an enemy's country, after the commencement of hoſtilities, may not be ſent hither? It is clearly competent to a *Britiſh* ſubject to reſide in *Holland* in time of peace, or to have a factor in that country; there has always been an *Engliſh* factory at *Rotterdam*, and this appears by ſome old acts of parliament to have been conſidered ſo meritorious, that the Legiſlature thought fit to legitimate the children of *Engliſh* ſubjects born there. That being ſo, if hoſtilities commence, muſt not the perſons reſident there bring their fortunes home? It is ſaid that, in this caſe, the goods were purchaſed ſince the commencement of hoſtilities. But we muſt remember that a man cannot always remit his goods and effects to another country in ſpecie. He muſt convert them into ſuch goods as will be merchandizable in the place to which he wiſhes to remit them. It is not ſaid that theſe parties carried on trade, but only that they bought theſe particular goods. Without therefore infringing on the general queſtion, whether a *Britiſh* ſubject may carry on trade in an enemy's country in time of war (*a*), (which I ſhould not wiſh to decide without the Court being full,) but ſteering clear of that general queſtion, (which need not here be raiſed, as on the facts ſtated we ſhall rather intend for that againſt the inſured,) I think the Plaintiff ought to recover. The caſe cited from the *Cockpit*, gives me no ſatisfaction. The ſituation of the inſurer will not be varied, whether the goods be purchaſed before or after hoſtilities.

Rooke J. The objections which have been made by the Defendants do them no credit; and they ought not to have made them. Firſt, it is clear from the words of the act, and from the decisions

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(*a*) As to which vide *Park, Inſur*. 237, 8, 9.

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deciſions, both here and in the King's Bench, that the policy is well warranted in point of form; ſecondly, the Defendant was aware at the time he made the inſurance what ſort of contract he was entering into, and his defence is unconſcientious, but having ſet up that defence we muſt give judgment on the point of law. I own that in reading this caſe I cannot decide it clear of the general queſtion, whether it be legal to traffic, during time of war with an enemy's country? The facts are ſo generally ſtated in the caſe, that they import to my underſtanding a general trading. The goods were purchaſed at *Rotterdam*; when they were purchaſed, when they were ſhipped, and when they were captured, open hoſtilities exiſted. Under theſe circumſtances, if the Plaintiffs meant only to bring home their own property, it might have been ſo expreſſed. But being ſtated in this way, I think it of neceſſity brings on the general queſtion; on which I am more ready to ſay that I have great doubts, as it will not affect the judgment in this caſe, my Brothers having already declared their opinion in favour of the Plaintiffs. Had it been neceſſary to give an opinion on that queſtion, I ſhould have wiſhed for a further argument.

Judgment for the Plaintiff (*a*).

Nov. 26th.

FENTON *v.* RUGGLES.

If bail be put in without any deſcription, one of whom proves to be clerk to an attorney, and the other a perſon in a low ſituation, Plaintiff may take an aſſignment of the bail-bond.

BAIL in this caſe were put in within time, by the name of *Thomas Trimmer*, Gent. and *John Taylor*, Gent. without any farther deſcription. The Plaintiff did not except to the bail; but finding on inquiry, that the former was clerk to the Defendant's attorney, and the latter a porter, watchman, and ſhoe-black, at *Clifford's-Inn*, took an aſſignment of the bail-bond, and proceeded upon it. To ſtay the proceedings on the ground of irregularity, a rule *niſi* having been obtained on a former day,

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(*a*) The Court was preſſed by the Defendant to allow this caſe to be turned into a ſpecial verdict, in order that it might be carried into error, and it was ſtated that a ſpecial verdict being aſked for at the trial, *Eyre* Ch. J. ſaid that a caſe might be made, and afterwards turned into a ſpecial verdict if the Court ſhould think it neceſſary; and it was added in ſupport of the application, that the other underwriters on the policy were ready to be bound by a deciſion in error on this caſe. But the Court being of opinion that the inſured ought not any longer to be kept out of his money by this defence, refuſed the application.

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Le Blanc Serjt. now ſhewed cauſe, and contended that as an attorney's clerk could not become bail (*a*), the bail here put in might be conſidered as a nullity, and an aſſignment of the bail-bond might be taken: he cited *Ritchie* v. *Gilbert*, *Imp. Prac. C. B.* 214. ed. 4. and *Price* v. *Oldfield*, *H.* 37 *Geo.* 3. *C. B.*

Shepherd contrà admitted that an attorney's clerk cannot become bail, but inſiſted on the authority of *Thomſon* v. *Roubell*, *Doug.* 466. note [1], that the only mode by which the Plaintiff could take advantage of that circumſtance was by excepting to the bail: and that with reſpect to the ſecond bail, to allow an aſſignment of the bail-bond on the ground of the facts diſcloſed in the affidavit, would be to try his ſufficiency without bringing him up to juſtify.

But the Court ſaid, that as the Defendant had practiſed a trick upon the Plaintiff, he ſhould not avail himſelf of it, and

Diſcharged the rule with coſts (*b*).

(*a*) Vid. *Hawkins* v. *Magnall*, *Doug.* 467. and notes: *Boulogne* v. *Vautrin*, *Cowp.* 828. *Laing* v. *Cundall*, 1 *H. Bl.* 76.

(*b*) Vid. *Richardſon* v. *Morriſs*, 2 *Bl.* 1179.

DE GAILLON *v.* VICTOIRE HAREL L'AIGLE (*a*).

Nov. 27th.

If the huſband reſide abroad, and the wife trade and obtain credit in this country as a feme ſole, ſhe is liable for her own debts.

INDEBITATUS aſſumpſit. The declaration contained the common money counts.

Plea: That the Defendant, before and at the time of the making the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, was and from thence hitherto hath been, and ſtill is the wife of, and married to, one *John Martin Harel L'Aigle*, and which ſaid *J. M. H. L'Aigle* is now living, to wit, at *Weſtminſter*, &c.

Replication: That before and at the time of making the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, and from thence hitherto, the ſaid *John Martin Harel L'Aigle* lived and reſided in parts beyond the ſeas out of this kingdom, to wit, at *Hamburgh*; and that during all that time the ſaid *Victoire Harel L'Aigle* lived in this kingdom, ſeparate and apart from the ſaid *John Martin Harel L'Aigle*, and followed and carried on the trade and buſineſs of a merchant as a ſingle woman, and a ſole trader, to wit, at *Weſtminſter*, &c. and that the Plaintiff did not give any credit to the ſaid *John Martin Harel L'Aigle*, but traded and dealt with the ſaid *Victoire Harel* as a feme ſole, and on her ſole credit; and that the ſaid *Victoire Harel* made the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned as ſuch feme ſole as aforeſaid. And this, *&c.* wherefore, *&c.*

(*a*) Vide *ante*, p. 8.

To this there was a general demurrer and joinder.

Runnington Serjt. in ſupport of the demurrer. The queſtion here is, whether this Defendant being a married woman, and her huſband reſident abroad, is liable to be ſued? On the pleadings it does not appear that her caſe comes within the exception to the general rule of law eſtabliſhed by the modern caſes of *Corbett* v. *Poelnitz*, 1 *T. R.* 5. and of *Ringſtead* v. Lady *Laneſborough*, and *Barwell* v. *Brooks* cited (*a*) *ibid.* It is not ſtated here, that any permanent ſeparation from bed and board was agreed upon between the parties, or any ſeparate maintenance allowed; on which grounds the modern deciſions have proceeded. Accordingly in *Gilchriſt* v. *Brown*, 4 *T. R.* 766. a replication not ſtating a ſeparate maintenance (*b*) was held bad; and in *Clayton* v. *Adams*, executor, 6 *T. R.* 604. Lord *Kenyon* thought that a feme covert would not be liable where the ſeparation from her huſband was only temporary. If the Court go ſo far as to determine that the mere circumſtance of the huſband being out of the kingdom (*c*) makes the wife liable, a feme covert may be ſubjected to an execution, by her huſband quitting the kingdom, at a moment's warning. Nor will the trading averred in theſe pleadings make any difference; for no action lies againſt a feme covert trader, except by the cuſtom of *London*, in which caſe the huſband muſt be joined; whereas here the Defendant is ſued as a feme ſole (*d*).

Marſhall Serjt. *contrà*, was ſtopped by the Court.

Buller J. There is another ſet of caſes of a very different nature from thoſe which have been relied on by the Defendant; but which are much more applicable to this caſe. The firſt of theſe is the Lady *Belknap*'s caſe (*e*): now let us ſee if any ſound diſtinction between that caſe and this can be maintained. The huſband there was baniſhed, but it is not ſtated whether he was baniſhed for one year, or for five years, or for life (*f*): it

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(*a*) Reported *Cooke B. L.* 26 and 29. ed. 4th.

(*b*) *Stedman* v. *Gooch*, *Eſp. Caſ. N. P.* 7. *Ellah* v. *Leigh*, 5 *T. R.* 679. *Thomſon* v. *Hervey*, 4 *Burr.* 2178.

(*c*) Vid. *Moor*, 851.

(*d*) Vid. *Lean* v. *Shutz*, 2 *Bl.* 1195., where, in an action againſt a feme covert with a ſeparate maintenance, it was held that the huſband ſhould have been joined for conformity.

(*e*) 2 *Hen.* 4. 7. *a.* *Vide* alſo the caſe of Lady *Maltravers*, 10 *Ed.* 3. 53. *Sybell Belknap*'s caſe, 1 *Hen.* 4. 1. *a.* *Margery Weyland*'s caſe, 19 *Ed.* 1. *Ryley. Plac. Parl.* 66. *Deerly* v. *Ducheſs of Mazarine*, *Salk.* 116. and 646. *Ld. Raym.* 147. S. C. *Comb.* 402. S. C. and *Counteſs of Portland* v. *Prodgers*, 2 *Vern.* 104.

(*f*) It appears by the Year Book 1 *Hen.* 4. 1. *a.* that *Belknap* was baniſhed to *Gaſcony*, there to remain till he obtained the King's favour: which Sir *Edward Coke* conſiders as a baniſhment for ever. *Co. Litt.* 133. *a.* and adds, that if the huſband by act of parliament have judgment to be baniſhed but for a time, which ſome call relegation, that is no civil death. Vid. tam. *Hargrave*'s note 209.

was held ſufficient that he was in baniſhment at the time when Lady *Belknap*'s contract was made; and I can ſee but one principle on which the caſe could have been decided; *viz.* that the rights known to exiſt in law between huſband and wife were not interfered with, by allowing the wife to be taken in execution: as the huſband was baniſhed (though it be not ſtated whether for life or not) the matrimonial rights during his baniſhment were at leaſt ſuſpended. In later times the caſes have gone further. In *Sparrow* v. *Carruthers* (*a*), it was ſhewn in anſwer to evidence of coverture that the huſband was tranſported for ſeven years only, and after that time was expired he had a right to return, and demand the comfort of his wife, even if ſhe were in gaol; yet the huſband being abroad and not capable of enjoying the matrimonial rights it was held that the diſability of the wife was ſuſpended. In thoſe caſes the huſband was ſent out of the country for his crimes, whereas here the huſband has voluntarily abandoned his wife, and, for any thing that appears, never was in *England*, and perhaps never may come here. The wife has traded as a feme ſole, has obtained credit as ſuch, and ought to be liable for her debts.

Heath J. I am of the ſame opinion. The caſes of baniſhment and tranſportation of the huſband are directly in point. Beſides, it is for the benefit of the feme covert that ſhe ſhould be liable to an action in ſuch a caſe as this, otherwiſe ſhe could obtain no credit, and would have no means of gaining her livelihood. The huſband perhaps never was in *England*, and never may be, ſo that this caſe is not at all like thoſe which proceeded on the ground of a ſeparate maintenance.

Rooke J. of the ſame opinion.

Judgment for the Plaintiff (*b*).

(*a*) Cited in *Lean* v. *Shutz*, 2 *Bl.* 1197. and in *Corbett* v. *Poelnitz*, 1 *T. R.* 7.

(*b*) Vid. etiam *Eſpin. Caſ. N. P.* 554. *Watford* v. *Duchaſſe de Pienne*, whom Lord *Kenyon* ruled to be liable for debts contracted by her during her huſband's abſence from this country, though at his departure he propoſed returning in a ſhort time, but had in fact been abſent ſome years.

LEADER *v.* DANVERS.

Nov. 27th.

The Court refuſed to grant an attachment againſt the ſheriff, becauſe he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of purchaſers.

Cockell Serjt. moved for an attachment againſt the ſheriff of *Leiceſterſhire*, for having made an inſufficient return to a writ of *venditioni exponas.*

1798.

Lewder v. Danvers.

The Plaintiff having ſued out a *fi. fa.* the ſheriff returned that he had levied to the value of the ſum indorſed, but that the goods remained in his hands for want of purchaſers; upon which a *venditioni exponas* having iſſued, the ſheriff returned, that he had ſold a moiety of the goods levied, and that the remainder continued in his hands for want of purchaſers (*a*).

Cockell urged, that as no other writ could be ſent to the ſheriff while this *venditioni exponas* was in force, the goods under this return might remain in his hands for ever.

But the Court was of opinion, that the motion could not be ſupported, and that if the Plaintiff was diſſatiſfied with the return, he might ſet up a purchaſer of the goods himſelf.

Cockell took nothing by his motion.

(*a*) Vid. *Clerk* v. *Withers*, 6 *Mod.* 293. 2 *Ld. Raym.* 1075. S. C. where *Holt* Ch. J. ſays, "If a ſheriff ſeize goods to the value, "and return it, he is bound to find buyers." Alſo, *Cameron et al.* v. *Reynolds*, *Cowp.* 406. where Ld. *Mansfield* ſays, that upon a writ of *venditioni exponas* the ſheriff "muſt return "the money into court."

Nov. 27th.

ADAM and Wife, Executrix, *v.* KERR.

In debt on bond, if one of the atteſting witneſſes be dead and the other beyond the proceſs of the Court, it is ſufficient to prove the hand-writing of the witneſs that is dead. *Qu.* Whether evidence of a cuſtom in *Jamaica* to execute bonds by ſubſtituting a mark with a pen for a ſeal, be admiſſible in ſupport of a declaration on a bond ſealed, *&c.*?

DEBT on bond. The declaration was in the uſual form, averring the bond to have been made and ſealed by the Defendant, with a profert accordingly. Plea, non eſt factum.

The inſtrument in queſtion was made in *Jamaica*, and atteſted by two witneſſes, but being produced at the trial before *Rooke* J. at the *Weſtminſter* ſittings in term, appeared to have no ſeal, though a mark of a particular kind had been made with a pen, in the place where bonds are uſually ſealed. Evidence was admitted to ſhew a cuſtom in *Jamaica* to execute bonds in this manner. One of the atteſting witneſſes having been proved to be dead, and the other to be reſident in *Jamaica*, the hand-writing of the former only was eſtabliſhed, and no evidence was given of the hand-writing of the obligor. Verdict for the Plaintiff, ſubject to the opinion of the Court.

Heywood Serjt. moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit be entered; and inſiſted, 1ſt, that the hand-writing either of the witneſs living in *Jamaica*, or of the obligor, ſhould have been proved; 2dly, that the evidence of the cuſtom in *Jamaica* ſhould not have been admitted.

BULLER J. On the laſt ground there is no objection to the rule to ſhew cauſe being granted, but I am clear there is nothing in the firſt point. Where a witneſs is dead, the courſe is to prove his hand-writing. In this caſe one of the atteſting witneſſes was dead, and the other was beyond the reach of the proceſs of the Court; the beſt evidence, therefore, which could be obtained was given (*a*). The hand-writing of the obligor need not be proved: that of the atteſting witneſs, when proved, is evidence of every thing on the face of the paper; which imports to be ſealed by the party.

The Court accordingly granted a rule to ſhew cauſe on the laſt ground, but recommended the Defendant to accede to the terms of the Plaintiffs taking judgment without coſts.

The caſe being called on this day, *Heywood* for the Defendant aſſented to the propoſal made by the Court, and on thoſe terms the Rule was diſcharged.

PIERSON *v.* GOODWIN.

Nov. 28th.

If a Defendant be ſuperſedeable for want of judgment being entered up in time, but not actually diſcharged, he cannot be detained in an action on the judgment.

THE Defendant was arreſted on the 8th of *September* 1797 by proceſs out of the Court of King's Bench; on the 5th of *February* 1798 he was charged with a declaration; on the 8th of the ſame month he was removed by habeas corpus to the Fleet; judgment (which went by default) was not entered up till the 26th *July*, in the *Trinity* vacation following, and the Defendant was therefore ſuperſedeable, according to the practice of both Courts: on this ground a ſummons for the 31ſt *October* was taken out before Lord *Kenyon*, for the Plaintiff to ſhew cauſe why the Defendant ſhould not be diſcharged out of the cuſtody of the Warden of the Fleet; this order, at the particular requeſt of the Plaintiff's attorney, ſtood over till the 5th *November*; but between the 31ſt *October* and the 5th *November* the Defendant was charged with a declaration at the ſuit of the Plaintiff in an action on the judgment. The Plaintiff's attorney not attending to ſhew cauſe on the 5th *November*, an order was made for a *ſuperſedeas* to iſſue.

Le Blanc Serjt. this day ſhewed cauſe againſt a rule *niſi* for diſcharging the Defendant, in the action on the judgment, out of the cuſtody of the Warden of the Fleet, on his entering a common appearance, and contended that the preſent application was not warranted by the rule made in *Hil.* 8 *Geo* 2. (*a*), as that only extends to caſes

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(*a*) Vid. *Coghlan* v. *Williamſon*, *Doug.* 93. *Holmes* v. *Pontin*, *Peake. N. P.* 100. *Cooper* v. *Marſden*, *Eſpin. Caſ N. P.* 2. *Barnes* v. *Trompowſky*, 7 *T. R.* 265. and *Wallis* v. *Delancy*, *ibid. n.* (*c*).

(*a*) Ordered, that in all caſes where a priſoner in the Fleet or other gaol or priſon, is diſcharged or ordered to be diſcharged by *ſuperſedeas* for want of proſecution, and ſuch priſoner be afterwards arreſted or detained in cuſtody, by action of debt brought upon judgment obtained in the cauſe wherein ſuch priſoner was ſo diſcharged, or ordered to be diſcharged, that a common appearance ſhall be accepted for the Defendant in ſuch action of debt upon judgment. *Cooke's Rules and Orders C. B. Imp. Prac. C. B.* 173. ed. 4.

PIERSON v. GOODWIN.

where the priſoner is actually *diſcharged or ordered to be diſcharged* before he is detained in an action on the judgment.

Shepherd Serjt. in ſupport of the rule.

HEATH and ROOKE J^s^ (*abſente Buller* J.) were of opinion that the actual diſcharge of a priſoner relates back to the time when he has a right to be diſcharged, *viz.* to the time when he is ſuperſedeable, and that the practice of the Court was with the Defendant, and accordingly made the

Rule abſolute (*a*).

(*a*) Vid. *Foy* v. *Percy*, *T.* 8 *Geo.* 3. *C. B.* cit. per *Buller* J. 1 *T. R.* 592. *contrà* in *B. R. Hutchins* v. *Kenrick*, 2 *Burr.* 1048. *Roſe* v. *Chriſtfield*, 1 *T. R.* 591. and *The London Aſſurance Company* v. *Perkins*, cit. *ibid.*

MICHAELMAS TERM, 39 Geo. III.

WHEREAS the Right Honourable the Lord High Chancellor hath been pleaſed, by an order bearing date the 12th day of *July* laſt, to direct that from and after ſuch day no writ of *Dedimus Poteſtatem*, to be executed in *England*, ſhall iſſue under the Great Seal, directed to any perſons except the Judges, Serjeants at Law, Barriſters of five years ſtanding, or Solicitors or Attorneys of ſome of the Courts in *Weſtminſter-Hall*, the Judges of the Court of Seſſion and Exchequer, Advocates and Clerks to the Signet of five years ſtanding, in *Scotland*: It is ordered, that from and after the laſt day of this Term, no Common Recovery or Fine ſhall be ſuffered to paſs, unleſs the taking of the Warrants of Attorney for ſuffering any Common Recovery or Caption of any Fine be before one of the Juſtices or Barons of his Majeſty's Courts of Record in *Weſtminſter-Hall*, or one of the Serjeants at Law, unleſs an affidavit be made and filed, ſtating that the Commiſſioners taking the ſame are, to the beſt of the Defendant's information and belief, either Barriſters of five years ſtanding, or Solicitors or Attornies of ſome of the Courts in *Weſtminſter-Hall*, the Judges of the Court of Seſſion and Exchequer, or Advocates and Clerks to the Signet of five years ſtanding, in *Scotland*.

F. BULLER.
J. HEATH.
G. ROOKE.

Lord Chief Juſtice *Eyre* was abſent during the whole of this Term, from indiſpoſition.

END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED IN THE Court of COMMON PLEAS, IN Hilary Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

JONES *v.* CHUNE one &c.

Jan. 25th.

If notice of a writ of inquiry to be executed at a particular hour and place, be continued, the notice of continuance need not expreſs any hour or place.

THIS was a motion to ſet aſide the writ of inquiry executed in this caſe for irregularity.

Judgment having been ſigned for want of a plea, notice was given that a writ of inquiry would be executed at the Secondaries' office in *Lothbury*, between the hours of eleven and one on a particular day. This notice was afterwards continued to a ſubſequent day, but in the notice of continuance no mention was made of the hour or place at which the writ of inquiry would be executed. The Defendant did not attend; and a verdict was found for 1 *l.* 17 *s.*

Shepherd Serjt. in ſhewing cauſe contended, that the notice of continuance was regular, as it neceſſarily referred to the time and place mentioned in the original notice, and added, that it was notorious that writs of inquiry always were executed between the hours of eleven and one, unleſs the convenience of both parties particularly required that it ſhould be otherwiſe. He alſo relied on the circumſtance of this being a ſmall debt due to a tradeſman, and that the Defendant having been ſummoned to the Court of

Requeſts pleaded his privilege as an attorney and forced the party to this more expenſive proceeding.

Williams Serjt. contrà contended, that notices of this kind were conſtrued ſtrictly, and that a notice of a writ of inquiry to be executed between eleven and two had been held bad (*a*). He urged alſo that as writs of inquiry are occaſionally executed between four and ſix this notice of continuance was not ſufficiently certain.

Sed per EYRE Ch. J. (after a reference to the officers, who ſaid that the point had never been ruled, but that all the printed forms of continuances as well as of original notices expreſs both the hour and place)—A more ungracious application never came before the Court. The juſtice of this verdict is not impeached, and the only queſtion to be conſidered ariſes on the ſimple ground of a ſuppoſed irregularity in not mentioning the hour and place in the notice of continuance. Ungracious as it is, if this ſuppoſed irregularity is eſtabliſhed on authority or on principle the Defendant muſt ſucceed. I am not ſatisfied however that it is ſupported by either. Though the printed forms do expreſs the hour and place in the notice of continuance as well as in the original notice, yet the queſtion is how far they are neceſſary, and what would be the effect of omitting them? Does the omiſſion enable the Plaintiff to chuſe his own time and place? If ſo, the objection would be well founded. I think that if an original notice be given ſpecifying the hour and place as well as the day, and that notice be afterwards continued with an alteration of the day only, the latter will refer to the former and incorporate the hour and place: and that it would be an irregularity in the Plaintiff to execute his writ of inquiry at any other hour or place than thoſe mentioned in the original notice.

ROOKE J. I am of the ſame opinion. Had this application been made on the ground of the writ of inquiry having been executed at a different time and place from thoſe mentioned in the original notice I ſhould have thought it well founded.

Rule diſcharged with coſts.

(*a*) *Robinſon* v. *Philips*, *Prac. Reg.* 445. *Barnes* 296. S. C. *Vide etiam Foſter* v. *Smales*, *Barnes* 295. *Hannaford* v. *Holman*, *ibid.* *Laſt* v. *Denny*, *Barnes* 302. *Prac. Reg.* 446. S. C. *Le Mark* v. *Newman*, *Com.* 551. *Barnes* 299. S. C. *Prac. Reg.* 447. S. C. *Squire* v. *Almond*, *Barnes* 297. *Arnold* v. *Squire*, *Sayer* 181. *Iſom* v. *Fowen*, 2 *Stra.* 1142.

STEVENTON one &c. *v.* WATSON and Others.

Jan. 26th.

This Court will not ſtay proceedings in an action on an attorney's bill, brought ſubſequent to the order of the judge of another court for its taxation, but previous to that taxation having taken place.

THE Plaintiff who was an attorney having delivered a bill of coſts to the Defendants, the latter obtained Lord *Kenyon*'s order for referring it to be taxed; before any taxation had taken place the plaintiff commenced an action upon the bill in this court. *Le Blanc* Serjt. now moved for a rule niſi to ſtay proceedings in this action, and that the Plaintiff ſhould pay the coſts incurred ſubſequent to Lord *Kenyon*'s order.

Sed per Curiam. If the order for taxation had been made in this Court an attachment might have been granted; but where an order is made by one of the judges of the Court of King's Bench, and pending that order the party ſues in another court, it is for the Court of King's Bench to enforce the order. We cannot prevent a party from purſuing a remedy to which he is entitled by law unleſs in ſo doing he incurs a contempt of this Court.

Le Blanc took nothing by his motion.

JENKINS *v.* LAW.

Jan. 29th.

An affidavit to hold to bail ſtating the Defendant to be indebted "for "damages "awarded "and for "coſts and "expences "taxed and "allowed," is ſufficiently certain; for it will be inferred that the award and taxation are ſuch as will ſupport the action.

SHEPHERD Serjt. obtained a rule to ſhew cauſe why the Defendant ſhould not be diſcharged out of cuſtody on entering a common appearance, on the ground of a defect in the affidavit to hold to bail, which ſtated, that the Defendant was indebted to the Plaintiff in a certain ſum "for damages awarded, and for coſts and expences taxed and allowed," contending, that it did not appear that the award or taxation were made by competent authority.

Cockell Serjt. this day in ſhewing cauſe, urged that if the original affidavit ſhould be deemed defective, ſtill the Court would allow the Defendant to file a ſupplemental affidavit.

EYRE Ch. J. I am not ſatisfied that the original affidavit does not ſufficiently alledge a cauſe of action. If a Plaintiff ſwear that a defendant is indebted to him "for goods ſold and delivered" it is enough, and he need not ſet out ſo much of the tranſaction as will ſhew that it amounted to a legal ſale, for he takes upon himſelf to ſay, that ſuch a ſale and delivery took place as conſtitute a cauſe of action. In the preſent caſe I think the word "awarded" is to be conſtrued in its legal ſenſe, and that the Plaintiff takes upon himſelf to ſay, that an award and taxation have been made upon which a right of action may accrue. If indeed the Court were not ſatisfied with the original affidavit, this would be preciſely the caſe in which a ſupplemental affidavit ſhould be allowed, becauſe it would not in any degree vary the original affidavit, but only explain an ambiguity.

Per Curiam. Rule diſcharged.

Jan. 29th.

DOBSON *v.* Sir WM. HERNE Knight and Another Sheriff of *Middleſex.*

The omiſſion of "and "thereupon "the ſaid "*I. S.* com- "plains" in the beginning of a declaration of treſpaſs on the caſe is no cauſe of ſpecial demurrer.

ACTION on the caſe by the landlord of certain premiſes againſt the ſheriff for removing the goods of his tenant under a *fi. fa.* without having previouſly paid to the Plaintiff three quarters of a year's rent then in arrear, according to the proviſions of 8 *Ann c.* 14. *ſ.* 1. The declaration began thus. "Sir *W. H.* "Knight and *R. W.* Eſq. were attached to anſwer unto *John* "*Dobſon* in a plea of treſpaſs on the caſe for that whereas the "ſaid *J. D.* heretofore to wit on &c. at &c. did demiſe and let "to one *J. P. Gaſhiot* a certain meſſuage" &c. ſtating entry and poſſeſſion by him "and the ſaid *J. D.* further ſaith that afterwards "and during the continuance of the ſaid demiſe" &c. proceeding to the end in the uſual form.

To this there was a ſpecial demurrer, aſſigning for cauſe "that "it does not appear in or by the ſaid declaration that the ſaid "*John* complains by attorney (*a*) or otherwiſe againſt the ſaid "Sir *W. H.* and *R. W.* of or for the premiſes therein mentioned: "and alſo for that the ſaid declaration is merely by way of recital, "and does not contain any poſitive allegation that the ſaid Sir "*W. H.* and *R. W.* committed the ſaid ſeveral ſuppoſed grievances "therein mentioned: and alſo for that the ſaid declaration is in "other reſpects uncertain inſufficient and informal."

Joinder in demurrer.

Shepherd Serjt. in ſupport of the demurrer. The whole of this record is a mere recital of a writ having been ſued out without any averment that the Plaintiff complains of or alleges any thing againſt the Defendant. The declaration ſhould have been in this

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(*a*) The omiſſion of the attorney's chriſtian name was held to be error in *Hewſon*'s caſe. 1 *Rol.* 336.

form. "The Defendant was attached to anſwer the Plaintiff in "a plea of treſpaſs on the caſe and thereupon the Plaintiff com-"plains &c." I do not mean to contend that it is neceſſary to ſtate that the Plaintiff complains by attorney, though that is one of the objections ſtated in the ſpecial demurrer. Before the rule of Court 1654, ſ. 16. the writ was recited at length in all declarations as is now done in declarations in treſpaſs only; and thereupon the Plaintiff made his allegations. By that rule the Plaintiff is allowed in all caſes except treſpaſs to ſtate the writ ſhortly: but when he has ſo done he muſt make his complaint and allegations in the ſame manner as was neceſſary before the rule referred to. When pleadings were *ore tenùs* the writ being returned and the parties having appeared the Counter read the writ to the Court and then mentioned the time place and circumſtances contained in it &c. and the particular damage accrued. *Gilb. C. P.* 47. *Ed.* 2. The preſent caſe ſtands as if the writ had been read but no count had followed.

Marſhall Serjt. *contrà* was ſtopped by the Court.

Eyre C. J. The Defendant's objection ſeems to be that there is no declaration: but I do not perceive that cauſe among the ſpecial cauſes of demurrer; the complaint is that the declaration fails in certain particulars, but the exiſtence of a declaration is admitted. The firſt objection *viz.* that the complaint is not made by attorney has been abandoned. The ſecond objection is that the declaration is merely by way of recital and does not contain any allegation of the Defendant having committed the offences there mentioned. As to this I am of opinion that the allegation is poſitive enough. The Defendant's objections are not ſufficient to entitle him to judgment; but as the declaration is drawn in a ſlovenly manner and ought not to ſtand on the records of the Court, I think that the Plaintiff ſhould have leave to amend without coſts.

Rooke J. Of the ſame opinion.

Leave given to amend without coſts.

1799.

Feb. 5th.

DE GAILLON *v.* VICTOIRE HAREL L'AIGLE.

At the execution of a writ of inquiry after judgment on demurrer it is not competent to the Defendant to controvert any thing but the amount of the ſum in demand.

JUDGMENT having been given againſt the Defendant in this caſe on demurrer (*a*), the Plaintiff at the execution of a writ of inquiry proved that the Defendant had acknowledged the debt to a certain amount: the Defendant on the other hand adduced evidence to ſhew that ſhe had only acted as agent for her huſband. The under-ſheriff directed the jury, that if they ſhould be of opinion that the Defendant really acted in the tranſaction as agent for her huſband, they ought to find a verdict for the Plaintiff with only 1*s.* damages. This they accordingly did.

Marſhall Serjt. having obtained a rule to ſhew cauſe why the execution of this writ of inquiry ſhould not be ſet aſide on the ground of improper evidence having been admitted on the part of the Defendant,

Shepherd Serjt. ſhewed cauſe and contended that although the Defendant by demurring had admitted ſomething to be due, yet that it was competent to her to ſhew that the particular debt proved by the Plaintiff was contracted by her as agent only, and was not the debt admitted by the demurrer.

But the *Court* were clearly of opinion that this evidence ought not to have been admitted; that the only queſtion to be decided by the jury was the amount of the debt; and that the queſtion whether the debt were contracted by the Defendant as agent for her huſband, or in her ſeparate capacity, muſt be taken to be determined by the record.

EYRE C. J. added: I am not aware that I have ever concurred in any deciſion in which it has been held that if a perſon deſcribing himſelf as agent for another reſiding abroad, enter into a contract here, he is not perſonally liable on the contract.

Per Curiam, Rule abſolute (*b*).

(*a*) Vid. *ante* 357.

(*b*) Vid. *Bevis* v. *Lindſell*, 2 *Str.* 1149. *Thelluſſon* v *Fletcher*, *Doug.* 315. *Ed.* 3. *Green* v. *Hearne*, 3 *T. R.* 301. and *Shepherd* v. *Charter*, 4 *T. R.* 275.

Pell *v.* Brown.

Feb. 8th.

Where judgment has gone by default on a promiſſory note, no irregularity previous to the judgment can be ſhewn as cauſe againſt referring the note to the prothonotary.

A rule *niſi* having been obtained by *Sellon* Serjt. for referring a promiſſory note, on which judgment had gone by default, to the prothonotary to compute principal intereſt and coſts, *Heywood* Serjt. ſhewed for cauſe againſt it that the proceſs was not ſerved till two days after it was returnable.

But the *Court* were of opinion that while the judgment remained in force no cauſe could be ſhewn againſt this rule founded on any irregularity previous to the judgment; and that if the judgment had been irregularly obtained the Defendant might move to ſet it aſide.

Rule abſolute.

Doe ex dim. John Bailey *v.* Roe.

Feb. 9th.

Service of a declaration in ejectment on one of two tenants in poſſeſſion, is good ſervice on both.

Kerby Serjt. moved for judgment againſt the caſual ejector, ſaying that as the affidavit of ſervice of declaration was not in the uſual form he would ſtate the ſubſtance of it. The deponent went to the houſe of *Thomas Bailey* and *Wm. Kirk* the tenants in poſſeſſion, and ſeeing two women in the houſe tendered and explained to them a declaration which they refuſed to accept and which he faſtened on the premiſes; in returning he met *Wm. Kirk*, to whom he tendered and explained another copy which he likewiſe refuſed to accept and which the deponent faſtened on another part of the premiſes.

Eyre Ch. J. I do not know that we have ever conſtrued the rule of Court ſo ſtrictly as to hold that ſervice on one of two tenants in poſſeſſion may not be conſidered as a good ſervice. In this caſe it is expreſsly ſworn that a declaration was tendered to *Kirk* who refuſed to receive it.

Rule granted.

Menham Aſſignee &c. of a Bankrupt *v.* Edmonson.

Feb. 9th.

It is no objection to a commiſſion of bankruptcy that it was ſued out with intent to defeat a previous execution, if no colluſion appear on the part of the bankrupt. If a creditor accompany the ſheriff's officer in levying an execution which is afterwards avoided by a commiſſion of bankruptcy, trover may be maintained againſt him by the aſſignees though he has never received either the goods or their value from the ſheriff.

Trover for goods taken in execution at the ſuit of the Defendant. The cauſe was tried before *Rooke* J. at the *Guildhall* ſittings in this term, when it appeared that the act of bankruptcy was committed in *December* 1796; that in *June* following a commiſſion was ſued out, under which four or five creditors proved their debts: and that the debt of the petitioning creditor aroſe on two notes drawn by the bankrupt in his favour for a good conſideration: that on the 30th *March* in the ſame year the goods in queſtion were taken in execution at the ſuit of the Defendant who accompanied the ſheriff's officer to ſee the writ executed.

At the trial it was objected by the counſel for the Defendant, that the action of trover was improperly brought; as it would only lie againſt the ſheriff in whoſe hands the money levied by the execution remained. But this was over-ruled. It was then urged that the commiſſion was fraudulently taken out for the purpoſe of avoiding the execution. The learned Judge left the queſtion of fraud to the jury, having firſt obſerved that he thought the evidence preponderated in favour of the Plaintiff; that the act of bankruptcy took place three months before the execution was thought of; but that the commiſſion was taken out in conſequence of the execution, and that under all the circumſtances the jury might perhaps be warranted in finding the bankruptcy fraudulent. Verdict for the Defendant.

Clayton Serjt. having on a former day obtained a rule to ſhew cauſe why this verdict ſhould not be ſet aſide and a new trial be had, on the ground of its being contrary to evidence, and in a great meaſure to the direction of the Judge,

Cockell Serjt. was now to have ſhewn cauſe.

Sed per EYRE C. J. I do not ſee ſufficient ground for ſaying that the bankruptcy was fraudulent. There appears to be nothing beyond mere ſuſpicion. It is indeed highly probable that the commiſſion of bankruptcy was ſued out in order to defeat the bill of ſale made under the execution. This has I doubt not been frequently done, nor is there any injuſtice in it; one creditor endeavours to gain an advantage over the other creditors by taking his whole debt in execution; they on the other hand when they ſee all the effects likely to be ſwept away endeavour to ſet aſide that execution by a commiſſion in order to obtain an equal diſtribution. It is alſo true that this *may be* done by the contrivance of the bankrupt and the whole *may be* a colluſion, in which caſe the Court will interfere. But where the parties before the Court are both creditors ſtanding in an equal degree of right and equally entitled to favour, unleſs there be ſome circumſtance of colluſion on which we can place our finger, the bankruptcy muſt take effect. The queſtion is not whether this commiſſion has been taken out to avoid the execution, but whether it has been ſo taken out with the colluſion of the bankrupt himſelf?

Cockell then deſired to take the opinion of the Court on the point which had been mooted at the trial, *viz.* Whether trover could be maintained againſt the Defendant, or whether it ſhould not have been brought againſt the ſheriff, in the hands of whoſe broker the money remained? He cited *Ruſh* v. *Baker*, *Bull. N P.* 41.

EYRE Ch. J. I had ſome doubts at firſt as to this point, and whether the execution having been regularly made under the authority of the law, and the goods regularly ſold, the action ſhould not have been brought for the money. There is a fact however in the caſe which decides the point, namely, that the Defendant was in company with the ſheriff's officer at the time of the execution. By the caſe cited it appears, that trover may be maintained againſt the party himſelf if he give a bond to the ſheriff, becauſe giving a bond is equal to intermeddling; actual intermeddling therefore muſt be equal to giving a bond (*a*).

Per Curiam, Rule abſolute.

(*a*) In the report of *Ruſh* v. *Baker*, in 2 *Stra.* 996, it is ſaid "that the action was well brought againſt the Defendant, who received the money without joining the officer" though no mention is there made of any bond being given to indemnify the ſheriff.

WHALLEY *v.* TOMPSON and Another.

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One being ſeiſed in fee of the adjoining cloſes *A.* and *B.* over the former of which a way had immemorially been uſed to the latter, deviſes *B.* with the "appurtenances": held that the deviſee cannot under the word "appurtenances" claim a right of way over *A.* to *B.*, as no new right of way is thereby created, and the old one was extinguiſhed by the unity of ſeiſin in the deviſor.

TRESPASS for breaking and entering the Plaintiff's cloſe.

Pleas 1ſt, Not-guilty. 2d, That long before the ſaid times when &c. and long before the ſaid Plaintiff had any thing in the ſaid cloſe in which &c. (to wit) on the 20th day of *March* in the year of our Lord 1753 one *Thomas Adderley* Eſq. was at one and the ſame time ſeiſed as well of two cloſes ſituated in the pariſh of *Weddington* aforeſaid formerly called the *Wood Cloſe* and *Ox Cloſe* and lately divided into four pieces and now known by the name of *Little Leyfield* and *Ox Meadow* as of and in the ſaid cloſe in which &c. in his demeſne as of fee and that the ſaid *Thomas Adderley* and all thoſe whoſe eſtate he then had in the ſaid cloſe formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* from time whereof the memory of man is not to the contrary had uſed and enjoyed and was uſed and accuſtomed to have uſe and enjoy and the ſaid *Thomas Adderley* had uſed and enjoyed by his farmers and tenants a certain way from the King's highway in the pariſh of *Weddington* aforeſaid leading from *Nuneaton* in the county aforeſaid to *Atherſton* in the ſaid county unto into through over and along the ſaid cloſe in which &c. to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* and from thence back again by the ſame way to the ſaid common highway for himſelf and themſeves and his and their tenants and his and their ſervants to paſs and repaſs on foot and with their cattle carts and other carriages at all times as occaſion required as an *eaſement and appurtenance* belonging to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* And the ſaid *Thomas Adderley* being ſo ſeiſed as well of the ſaid cloſe in which &c. as of the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Oloſe* and now called *Little Leyfield* and *Ox Meadow* and ſo having uſing and enjoying the ſaid way as an eaſement and appurtenance belonging to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* afterwards (to wit) on the ſame day and year laſt aforeſaid at *Weddington* aforeſaid in the county aforeſaid did duly make and publiſh a certain codicil to his laſt will and teſtament the ſaid codicil being in writing and duly executed to paſs real eſtates and did thereby (amongſt other things) give and deviſe the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* with their and every of their *appurtenances* to the uſe of his ſiſter *Elizabeth Liptrott* for and during the term of her natural life remainder to *Amicia Bracebridge* the then ſecond and youngeſt daughter of *Philip Bracebridge* Clerk and the heirs of her body, remainder to the right heirs of the ſaid *Philip* And the ſaid *Thomas Adderley* afterwards and before the ſaid times when &c. (to wit) on the 15th day of *February* in the year of our Lord 1757 at *Weddington* aforeſaid died, not having revoked or altered his ſaid codicil and ſo ſeiſed as aforeſaid as well of and in the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* with the rights members and appurtenances thereunto belonging as of and in the ſaid cloſe in which &c. upon whoſe death the ſaid *Elizabeth Liptrott* by virtue of the ſaid deviſe afterwards and before the ſame times when &c. (to wit) on the ſame day and year laſt aforeſaid entered into the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* together with all the rights members and appurtenances thereunto belonging ſo deviſed to her as aforeſaid and was thereof ſeiſed for and during the term of her natural life and had uſed and enjoyed by her farmers and tenants the ſaid way as an eaſement and appurtenance belonging to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* (to wit) at *Weddington* aforeſaid in the county aforeſaid and the ſaid *Elizabeth Liptrott* being ſo thereof poſſeſſed and ſo uſing and enjoying the ſaid way afterwards (to wit) on the ſecond day of *March* in the year of our Lord 1765 at *Weddington* aforeſaid died, whereupon the ſaid *Amicia Bracebridge* afterwards and before the ſaid times when &c. (to wit) on the ſame day and year laſt aforeſaid entered into the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* together with all the rights members and appurtenances thereunto belonging ſo deviſed to her as aforeſaid and became ſeiſed thereof to her and the heirs of her body and had uſed and enjoyed by her farmers and tenants the ſaid way as *an eaſement and appurtenance* belonging to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* (to wit) at *Weddington* aforeſaid in the county aforeſaid. And the ſaid *Amicia* being ſo ſeiſed as aforeſaid and ſo uſing and enjoying the ſaid way afterwards (to wit) on the 19th day of *September* in the year of our Lord 1769 at *Weddington* aforeſaid in the county aforeſaid intermarried with one *George Hemming* Eſquire whereby the ſaid *George* and *Amicia* in right of the ſaid *Amicia* became and were and ſtill are ſeiſed of and in the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* with all the rights members and appurtenances thereunto belonging to the ſaid *George* and *Amicia* and the heirs of the body of the ſaid *Amicia*, and had uſed and enjoyed by their farmers and tenants the ſaid way *as an eaſement and appurtenance* belonging to the ſame And being ſo thereof ſeiſed and ſo uſing and enjoying the ſaid way as laſt aforeſaid the ſaid *George* afterwards and before the ſaid times when &c. (to wit) on the firſt day of *January* in the year of our Lord

1796 demiſed the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* with all the rights members and *appurtenances* thereunto belonging to one *Thomas Thompſon* the elder, who thereupon entered into and became and ſtill is poſſeſſed of the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* together with all rights members and appurtenances thereunto belonging and held uſed and enjoyed the ſaid way as aforeſaid and being ſo poſſeſſed thereof the ſaid Defendants as ſervants of the ſaid *Thomas Thompſon* the elder and by his command at the ſaid ſeveral times when &c. paſſed and repaſſed on foot and with horſes mares geldings carts and other carriages from the ſaid King's common highway in the ſaid pariſh of *Weddington* unto into through over and along the ſaid cloſe in which &c. to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* and from thence back again by the ſame way to the ſaid common highway as occaſion required uſing the ſaid way as *an eaſement and appurtenance* to the ſaid cloſes formerly called the *Wood Cloſe* and *Ox Cloſe* and now called *Little Leyfield* and *Ox Meadow* as it was lawful for them to do for the cauſe aforeſaid. And this &c. wherefore &c.

General demurrer and joinder.

Le Blanc Serjt. was this day to have argued in ſupport of the demurrer on theſe grounds, *viz.* that *T. Adderley* could not preſcribe for a right of way over his own ſoil; that he could not have the way as an eaſement or appurtenance belonging to one cloſe while he was ſeiſed in fee of both, ſince whatever right of way might have exiſted while the cloſes were ſeparate property was extinguiſhed by the unity of ſeiſin (*a*); that being extinguiſhed therefore, it did not exiſt as a right of way, eaſement, appurtenance or

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(*a*) See this poſition ſupported by ſeveral caſes collected in *Vin. Abr.* Extinguiſhment, (A. & C.) But it appears that there is a diſtinction between rights which are of neceſſity and thoſe which are merely by way of eaſement; the former are not deſtroyed by unity of ſeiſin; as a way to church or market, 1 *Rol. Abr.* Extinguiſhment, 936. *l.* 1. *Sury* v. *Pigot*, *Poph.* 172. *per Dodderidge* J. 3 *Bulſt.* 340. S. C. *Noy* 84. S. C. or a gutter carried through an adjoining tenement, 11 *H.* 7. 25. or a watercourſe running over the adjoining lands. *Sury* v. *Pigot*, *Poph.* 166. *Latch* 153. S.C. 3 *Bulſt.* 340. S.C. though that is alſo ſaid to be becauſe it hath it's being not by preſcription but *ex jure naturæ*, *per Whitlock* J. S. C. So things not iſſuing out of lands as part of the profits, but due in another reſpect, though taken within the lands, are not extinguiſhed by unity of poſſeſſion, *Dav.* 5, 6. as warren, 35 *H.* 6, 55, 56. *Dyer* 327. franchiſes, waife, ſtray, wreck, leet, &c. Nor things which are part of the profits of the land and payable by ſuch perſon only who has the land, if they commence upon any perſonal reſpect, and not in reſpect of the land, and ſo that the perſon only is charged, and not the land, as annuities, tithes, proxies &c. *Dav.* 5, 6.

any ſpecies of property corporeal or incorporeal, which could paſs by the will of *T. Adderley* under the word "appurtenances" ſuppoſing that word to be ſufficient to carry it; that not being ſtated as a way of neceſſity it could not be raiſed by operation of law: and not being given by expreſs words the deviſee could not take it as a new grant.

Williams Serjt. *contrà* (being called upon by the Court, who inclined againſt the plea in bar, to ſtate the grounds on which he meant to defend it). The Court will not on a general demurrer, take notice that this right of way in *T. Adderley* is informally pleaded *viz.* by way of preſcription. The averment in ſubſtance amounts to this; that *T. Adderley* for a long time previous to the deviſe uſed a way over the *locus in quo*, to the cloſe deviſed, as an eaſement and appurtenance to the latter. By the deviſe therefore of "*Leyfield* and *Ox Meadow* with their and every of their appurtenances" the way in queſtion may well paſs; the word "appurtenances" being clearly ſufficient to carry a right of way. *Plowd.* 170. Suppoſe a man being poſſeſſed of two cloſes with a cauſeway leading over one into the other, alienate the latter; after which the alienee uſe and enjoy the cauſeway for forty years; would he not have obtained a good right of way? Such a uſer would be ſufficient evidence to ſupport an action on the caſe by the alienee, for any interruption of that right. Now in this caſe the deviſor died in 1757; the deviſee for life entered and enjoyed the way till his death, upon which the remainder-man entered and has enjoyed it from that time to this. Then is it conſiſtent to ſay, that the defendant might maintain an action for the interruption of this way, and yet that he cannot uſe it without being ſubject to an action?

EYRE Ch. J. There can be no doubt that the word "appurtenances" may convey an exiſting right of way. But from the moment that the poſſeſſion of two cloſes is united in one perſon, all ſubordinate rights and eaſements are extinguiſhed. The only point therefore that could poſſibly be made in this caſe is, that the ancient right which exiſted while the poſſeſſion was diſtinct was merely ſuſpended, and may revive again. If it be ſtated, that a man and his anceſtors have been in poſſeſſion of two adjoining cloſes, and a preſcription be then ſet up for a way over one to the other, that preſcription will be *felo de ſe.*—If indeed the fields were let to different tenants, and from time immemorial a cauſeway had been

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been built over one field to the other, by which the tenants had paſſed and repaſſed, this in uſer and in fact would be a road, but there would be no right to a road in point of law, for no right could exiſt in the owner independent of the fee-ſimple. If an alienation of one of the cloſes was to take place, and the alienee were afterwards allowed to uſe the cauſeway, a right might poſſibly grow out of ſuch uſer to him; but that is not the caſe on this record, and unleſs the claim of theſe Defendants can be put in ſome legal form it will not avail them. Circumſtances thrown into the record, which might poſſibly be ſufficient to ſupport an action on the caſe, will not neceſſarily be an anſwer to an action of treſpaſs. I admitted, during the argument, that the word "appurtenances" would carry any eaſement or legal right. Upon that it was obſerved, that if the road in queſtion had been deſcribed in the deviſe it would have paſſed: and that obſervation was followed up by a queſtion, Whether the word "appurtenances" would not carry any eaſement or right that would paſs by a particular deſcription? To which I anſwer, that it's operation muſt be confined to an old exiſting right, and that if the right of way had paſſed in this inſtance it muſt have paſſed as a new eaſement (*a*). Had the deviſe been "with the way now uſed" it would certainly have been a deviſe of the cloſe *A.* with an eaſement newly created. The word "appurtenances" in this will had nothing to operate upon.

Per Curiam, Judgment for the Plaintiff.

(*a*) A way to a mill having been extinguiſhed by unity of poſſeſſion in *J. S.*, he died; whereupon partition was made between his daughters; the mill and way were aſſigned to one and the land to the other: held that the way was revived: *tamen videtur* that it is a new way. *Bro. Abr. Extinguiſhment*, *pl.* 15.

Feb. 9th.

Ex parte GRACE.

If a perſon jointly interested with an infant in a leaſe, obtain a renewal to himſelf only, and the leaſe prove beneficial, he ſhall be held to have acted as truſtee, and the infant may claim his ſhare of the benefit; but if it do not prove beneficial he muſt take it upon himſelf.

ONE *Harriſon* being poſſeſſed of a beneficial leaſe under the truſtees of a charity, died leaving his widow adminiſtratrix of his effects. By his death Mrs. *Harriſon* became entitled to the leaſe jointly with *E. T. Harriſon*, her ſon by the deceaſed, and then an infant. Soon afterwards Mrs. *Harriſon* married *W. Grace*, who as her huſband having taken poſſeſſion of the above-mentioned leaſe and title deeds, on the approaching expiration of the leaſe (and

during

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during the infancy of *E. T. Harriſon*) treated with the truſtees for a renewal of it to himſelf only, and in his own name; this he accordingly obtained. *W. Grace* having afterwards become a bankrupt, his aſſignees took poſſeſſion of the leaſe and were proceeding to ſell it for the benefit of the eſtate, when *E. T. Harriſon* having attained the age of twenty-one, claimed his proportion of the money ariſing from the ſale of the leaſe. This matter having been referred to arbitration, an award was made in favour of *E. T. Harriſon*.

Shepherd Serjt. on a former day obtained a rule to ſhew cauſe why this award ſhould not be ſet aſide, and now contended, that no truſt reſulted to *E. T. Harriſon* by operation of law, but that the leaſe which *W. Grace* had obtained muſt be conſidered as his ſole property, ſince there was no covenant for renewal in the original leaſe. He urged that *W. Grace* by ſtipulation with the truſtees had been obliged to lay out money on the eſtate without being able to aſcertain whether *E. T. Harriſon* would aſſent to it, and that the principle of this award would enable an infant in ſuch a caſe to claim a benefit if the leaſe proved to be beneficial, and if otherwiſe to refuſe his concurrence and throw the whole burden on the truſtee.

Sed per EYRE Ch. J. Theſe arguments might have weight if it were now to be decided for the firſt time whether a perſon renewing a leaſe in which he is partly intereſted, and in which another perſon (that perſon being an infant) is alſo partly intereſted, ſhall or ſhall not be conſidered a truſtee. The point has been decided at leaſt forty times. *Grace* took the leaſe at his own peril; if it had not turned out beneficial he muſt have ſuſtained the loſs, but as it is a beneficial leaſe it muſt be for the benefit of the truſt. This is the peculiar privilege of the unprotected ſituation of an infant. In the preſent caſe it has clearly proved a beneficial leaſe, or this application would not have been made to the Court. As to any ſums which may have been paid for the renewal of the leaſe, or laid out in conſequence of it, *E. T. Harriſon* muſt contribute his due proportion before he can claim any advantage, and as the fund is in the hands of *Grace* he may do himſelf juſtice. The point is perfectly familiar; the truſt ariſes by implication of law, and is not within the ſtatute of Frauds. If *Grace* thinks himſelf aggrieved he may apply to a court of equity, which is more competent to diſcuſs this queſtion; but to me it appears that the award is both equitable and juſt, and not to be controverted.

Shepherd then added, that the aſſignees only wiſhed to take the opinion of the Court, and would be perfectly ſatisfied.

Per Curiam, Rule diſcharged.

Le Blanc Serjt. in ſupport of the award.

Feb. 11th.

KITCHIN *v.* BLANCHARD.

A Defendant cannot demand a bill of particulars till after appearance.

MARSHALL Serjt. this day ſupported a rule for ſetting aſide an interlocutory judgment, by ſhewing the following ſuppoſed irregularity, *viz.* The Defendant before appearance demanded a bill of particulars under a judge's order; previous to the expiration of which order the Plaintiff ſigned judgment for want of a plea. He contended, that a Defendant need not appear till he has actually obtained the particular; ſince the particular when obtained may afford a reaſon for not proceeding in the action, if the demand appear to be juſt.

The Court being of opinion that the Defendant has no right to demand a bill of particulars till he has appeared,

Diſcharged the rule.

Feb. 11th.

PAGE *v.* Sir JOHN EAMER Knight and Another.

The action on the caſe againſt the ſheriff for taking inſufficient pledges in replevin ought to be brought by the perſon making cognizance where there is no avowant on the record.

THIS was an action on the caſe by the plaintiff, who had made cognizance as bailiff of one *Alexander Blair* Eſq. in an action of replevin, againſt the Defendants as ſheriff of *Middleſex*, for having taken inſufficient pledges.

Plea. General iſſue.

This cauſe was tried before *Buller* J. at the *Weſtminſter* ſittings after laſt *Trinity* term, when it was objected that the action would not lie in the name of the perſon making cognizance, but ought to have been brought in the name of the landlord. The learned Judge however obſerving, that the objection was on the record and might be the ſubject of a motion in arreſt of judgment: the cauſe proceeded, and a verdict was found for the Plaintiff. Damages 120*l*.

Accordingly a rule niſi for arreſting the judgment having been obtained in laſt term, *Shepherd* Serjt. now ſhewed cauſe. The only queſtion in this caſe is, whether the perſon making cognizance be competent to maintain this action? Now as it is in the election of the Plaintiff in replevin to declare againſt the bailiff only, or to join the landlord with him, if the bailiff be not competent to maintain this action, the Plaintiff in replevin will always have it in his power to exempt the ſheriff from being reſponſible for taking inſufficient pledges. At common law the ſheriff was bound to take pledges for proſecuting the replevin: by the ſtat. of *Weſtm.* 2. *c.* 2. he is directed not only to take pledges for the proſecution but for the return of the diſtreſs, if it ſhall be awarded. On the conſtruction of that ſtatute it has been held, that an action will lie againſt the ſheriff if he take inſufficient pledges; and if an action will lie on that ſtatute, in whoſe favour can it lie but in his who is entitled to a return of the diſtreſs? Now the Plaintiff in replevin having in this caſe declared againſt the bailiff, he alone is entitled to the return. By the caſe of *Blackett* v. *Criſſop*, 1 *Ld. Raym.* 278. it appears, that when the ſheriff takes a bond for the return of the diſtreſs he does it by virtue of ſtat. *Weſtm.* 2. Now the 11 *Geo.* 2. *c.* 19. *ſ.* 23. directs, that ſuch bond may be aſſigned to the avowant or the perſon making cognizance, meaning thereby to give the party entitled to the return of the diſtreſs, an action on the bond againſt the ſureties in his own name, inſtead of his action in the name of the ſheriff. If then theſe ſureties had been ſufficient there is no doubt but that the perſon making cognizance would have had a right of action on the bond againſt the ſureties. Now on the conſtruction of ſtat. *Weſtm.* 2. the ſheriff ſtands in the place of the inſufficient ſureties, and is reſponſible for their default. On principle therefore the perſon making cognizance is not only entitled to bring this action, but is the only perſon who can maintain it. The ſheriff is reſponſible for the inſufficiency of the pledges; the pledges bind themſelves for the return of the diſtreſs; and the perſon to whom they are to anſwer, is he who alone can demand the return *viz.* the party making cognizance, who alone is entitled to ſue the writ *de retorno habendo*. Moreover the ſureties for the proſecution are anſwerable not only for the return of the cattle but alſo for the coſts of the action of replevin; and the only perſon entitled to thoſe coſts is the Defendant in replevin. [*The Court* obſerved, that at common law the pledges were only bound to anſwer for the amercement *pro falſo clamore*: but that as the ſecurity is now taken by bond, the Court will not relieve againſt the penalty without obliging the ſurety to pay coſts.] The judgment in replevin is ſingularly conſtituted: it is a double judgment, that the Defendant have a return, and that he recover the arrears of rent, though the proceeding be under the ſtat. 17 *Car.* 2. *c.* 7: and the reaſon for retaining the old form in addition to judgment for the recovery of the money, is ſtated in *Cooper* v. *Sherbrooke*, 2 *Wilſ.* 117. and *Baker* v. *Lade*, *Carth.* 254.

Cockell Serjt. in ſupport of the rule. The objection to the Plaintiff's recovery is, that he has no intereſt in the ſuit. Now it is eſſential in an action on the caſe that the party complaining ſhould prove himſelf to be really damnified. The landlord alone is entitled to the diſtreſs, and the bailiff is merely his inſtrument for the recovery of it. If a return be made, it is to the landlord's advantage; he therefore alone is ſubſtantially intereſted in obtaining it. No argument in the Plaintiff's favour can be drawn from that part of the 11 *Geo.* 2. which directs that the bond may be aſſigned to the party making cognizance; ſince it by no means follows from the expreſs proviſions of that ſtatute that he would be entitled to any action independent of the act. The caſe ſtands on the principles of the common law and the conſtruction of the ſtat. *Weſtminſter*, there being no authorities upon the ſubject. The action is brought againſt the ſheriff, becauſe the landlord is injured; then upon what principle can the bailiff be allowed to maintain it? If he recover damages he will not be entitled to retain them, but muſt pay them over to his principal.

Eyre Ch. J. I am very glad to find that the caſe is not incumbered with any authorities which might be ſuppoſed to ſtand in the way of plain juſtice and good ſenſe. Independent of authorities, it appears to me one of the cleareſt caſes that ever came before the Court. It is admitted that the Plaintiff in replevin may declare againſt the bailiff, without putting any perſon on the record to ſtand in the ſituation of avowant. Now by the courſe of the proceedings in replevin it appears clearly, that if the action be brought againſt the bailiff alone, and he maintain his cognizance, he will be entitled to judgment and to have the writ *de retorno habendo.* The law gives him a right to the poſſeſſion of the goods, and if the ſheriff return that the goods are eloigned, is not the bailiff damnified in being deprived of that poſſeſſion to which the law has given him a right, or ſhall the judgment which he has obtained be altogether defeated, becauſe there is a truſt and confidence exiſting between him and another perſon? It being once eſtabliſhed, that the action of replevin will lie againſt the bailiff alone, and that he may have the writ *de retorno habendo*, all the reſt follows as a neceſſary conſequence. It is immaterial to the ſheriff who brings the action, ſince he can be anſwerable but to one perſon, and that muſt be the perſon on record. I am perfectly ſatisfied on principles of reaſon and good ſenſe, independent of the laſt ſtatute, that the perſon making cognizance is the only one entitled to bring this action, and that if the landlord himſelf had brought it, we ſhould have been obliged, however unwillingly, to have given judgment againſt him.

Rooke J. I am clearly of the ſame opinion. The bailiff was the party on record in the action of replevin, the only perſon entitled to a return of the diſtreſs, and therefore the proper perſon to bring this action.

Rule diſcharged (*a*).

(*a*) When this motion firſt came on, the following caſe was referred to by Mr. Juſt. *Buller*, from the paper-book in his poſſeſſion.

Archer and Others, Aſſignees &c. v. *Dudley* and Others, *E.* 22 *Geo.* 3. *B. R.*—Debt by the Plaintiffs as aſſignees of *H. C. W.* Eſq. late ſheriff of *Shropſhire*, *ſecundum formam ſtatuti*, they being infants, and appearing by *Sarah* Baroneſs *Archer* their *prochein ami*, and complaining for that whereas *J. D.* complained to the ſaid *H. C. W.* againſt the Plaintiffs, for taking and unjuſtly detaining certain goods and chattels of the ſaid *J. D.* and prayed that they might be replevied and delivered to him; thereupon the ſaid *H. C. W.* took from the ſaid *J. D.* and the two other Defendants as reſponſible ſureties, a bond in double the value of the goods ſo diſtrained (that value being aſcertained by the oath of a credible witneſs) the condition of which was, that if the ſaid *J. D.* ſhould appear at the next county court to proſecute his action with effect againſt the Plaintiffs, and alſo make a return of the goods and chattels, if a return ſhould be adjudged, and alſo keep indemnified the ſaid *H. C. W.* and his deputy and bailiffs, touching the replevin, then the obligation to be void or elſe &c. *Profert* &c. —And thereupon *H. C. W.* replevied the goods &c. and *J. D.* at the next county court came in his own proper perſon and levied his plaint againſt the plaintiffs, and removed the record by *re. fa. lo.* into *K. B.* and complained &c. (here followed the declaration in replevin againſt the Plaintiffs and *T. Hunt* their bailiff, imparlance prayed by them and obtained, avowry by the preſent Plaintiffs and cognizance by *T. Hunt* for rent in arrear, future day to plead prayed by *J. D.*, his non-appearance and conſequent judgment *pro retorno habendo* to the preſent Plaintiffs); and Plaintiffs averring that *J. D.* made no return, by which the bond became forfeited to the ſaid *H. C. W.*, ſet out the aſſignment by him of the bond under the ſtatute to themſelves. By means whereof &c. and by force of the ſtatute &c. *actio accrevit* &c.

Plea. And the ſaid *J. D*, *J. C.*, and *H. W.* in their own proper perſons come and pray judgment of the aforeſaid bill becauſe they ſay that the ſaid *T. Hunt* in the ſaid bill mentioned againſt whom the ſaid *J. D.* levied his aforeſaid plaint as well as againſt the ſaid Plaintiffs in manner aforeſaid and who as their bailiff well acknowledged the taking of the aforeſaid goods and chattels in the ſaid condition of the ſaid writing obligatory and bill mentioned in manner and form as in the ſaid bill is alledged and to whom as a perſon making ſuch cognizance as aforeſaid the aforeſaid writing obligatory was or ought to have been aſſigned as well as to the ſaid Plaintiffs according to the form of the aforeſaid ſtatute, at the time of the exhibiting of the bill aforeſaid of the ſaid Plaintiffs was and ſtill is living and in full life to wit at &c. And this &c. Wherefore inaſmuch as the ſaid *Thomas* is not named in the ſaid bill they the ſaid *J. D.*, *J. C.*, and *H. W.* pray judgment of the ſaid bill and that the ſame may be quaſhed &c.

To this there was a general demurrer and joinder therein.

The Court were of opinion that the avowants being the parties intereſted, and the perſon making cognizance a mere man of ſtraw, the replevin-bond might well be aſſigned under 11 *Geo.* 2. *c.* 19. to the avowants only, without the cognizor, and accordingly gave

Judgment of *reſpondeas ouſter*.

Feb. 12th.

HOPKINS *v.* SHROLE.

The Court will not ſtay proceedings in an action of replevin, unleſs upon payment of the rent in arrear, together with all coſts, though the arrears were tendered before replevin with coſts up to that time.

THE Plaintiff who was tenant to the Defendant, not having paid his rent when it became due, was diſtrained upon; ſoon after the rent was tendered together with the coſts, but being refuſed by the Defendant, the Plaintiff replevied and entered into the uſual bonds to proſecute his ſuit, which he accordingly did.

Williams Serjt. on a former day moved to ſtay proceedings in the action of replevin, on payment by the Plaintiff of the rent in arrear, together with coſts up to the time of the tender made. He cited *Vernon* v. *Wynne*, 1 *H. Bl.* 24. and obſerved, that as the Plaintiff was obliged by the replevin bond to proceed, he ought not to be called upon to pay the coſts of the action.

Sed per Curiam. There is no ground on which we can allow this application (*a*). If a tenant neglect to pay his rent when due he muſt ſuffer for it. In *Vernon* v. *Wynne* the motion was made on payment of the coſts of the action.

Williams on hearing this moved to ſtay proceedings on payment of the rent in arrear and coſts up to the time of the application; and accordingly a rule *niſi* was granted. Againſt this *Heywood* Serjt. now ſhewed cauſe, and objected that the motion was only made to defeat the Defendant in replevin of his double coſts, and that the Plaintiff ought therefore to pay the coſts out of pocket. He ſuggeſted that another object might be to prevent the avowant going to trial at the next aſſizes, ſince perhaps the Plaintiff would never draw up his rule.

(*a*) Tender upon the land before a diſtreſs maketh the diſtreſs tortious; tender after the diſtreſs and before the impounding, maketh the detainer and not the taking wrongful; tender after the impounding maketh neither the one nor the other wrongful, for then it comes too late, becauſe that then the caſe is put to the trial of the law, to be there determined. 8 *Co.* 147. *a.* *Six Carpenters'* caſe, 5 *Co.* 76. *a.* *Pilkington's* caſe, 2 *Inſt.* 107.

1799.

Hopkins v. Shrole.

The Court however thinking the application reaſonable made the rule abſolute on the following terms.

On payment within a fortnight of the rent due, and coſts up to the preſent time, including the coſts of the application, all proceedings to ſtay, and that if the money be not paid within a fortnight, the avowant to be at liberty to proceed, and the Plaintiff to plead in bar *inſtanter* and take ſhort notice of trial.

Rogers *v.* Jenkins.

Feb. 12th.

If proceſs be ſued out in the name of two Plaintiffs, and declaration be delivered in the name of one only, it is bad.

A *Clauſum fregit* having iſſued againſt the Defendant at the ſuit of *T. Rogers* and *J. Barber*, a ſummons was made out in the ſheriff's office at the ſuit of *T. Rogers* only, and ſerved on the Defendant; to which he entered an appearance: on diſcovery of the miſtake another ſummons was made out at the ſuit of both Plaintiffs, and ſerved on the Defendant, but not till four days after the writ was returnable; to this no appearance was entered: a declaration was afterwards delivered in the name of both Plaintiffs, and judgment was ſigned for want of a plea. *Le Blanc* Serjt. having on a former day obtained a rule *niſi* for ſetting aſide this judgment for irregularity,

Runnington Serjt. now ſhewed cauſe, and contended, 1ſt, That any irregularity in the ſervice of the proceſs was waved by appearance (*a*). 2dly, That the variance was immaterial, it having been determined in *Hally* v. *Tipping*, *C. B.* 3 *Wilſ.* 61. that if a Plaintiff arreſt a Defendant in his own right, he may declare againſt him as executor if he will wave his bail, and in *Lloyd* v. *Williams*, *C. B.* 3 *Wilſ.* 141. 2 *Black.* 722. S. C. that a Plaintiff who has ſued out a *capias* in his own name, may declare *qui tam* (*b*).

(*a*) Vid. *Fox* v. *Money*, *ante*, 250. and *Davis* v. *Owen*, *ante*, 344. But a defect in proceedings cannot be waved. *Goodwin q. t.* v. *Parry*, 4 *Term Rep.* 577. and *Huſſey* v. *Wilſon*, 5 *Term Rep.* 254.

(*b*) *Vid. etiam The Weavers' Company q. t.* v. *Forreſt*, 2 *Str.* 1232. But where the proceſs is to anſwer the Plaintiff in a ſpecial character, he cannot declare generally. Thus if the proceſs be *qui tam*, *Canning* v. *Davis*, 4 *Burr.* 2417. or in the names of aſſignees, *Meggs* and Another, Aſſignees of *Cochran*, v. *Ford*, *E.* 25 *Geo.* 3. *Tidd Pr.* 225. *in notis*, the Plaintiffs cannot declare in their own characters. It is ſaid however in the caſe of *Lloyd q. t.* v. *Williams*, as reported 2 *Bl.* 722. that *Yates* J. in the caſe of *Canning* v. *Davis*, made this diſtinction, that though a Plaintiff ſtyle himſelf executor or give himſelf any other ſuperfluous deſcription in the proceſs it will not hurt, for the demand is ſtill the ſame, but that in the caſe before him the very nature of the demand was altered, the proceſs importing a demand to the King and the Plaintiff, and the declaration a demand to the Plaintiff only. *Quære.*

Sed per EYRE Ch. J. The defendant has appeared to a ſuit commenced againſt him by *T. Rogers*, and now he is declared againſt by *T. Rogers* and *J. Barber*. The queſtion is, whether the declaration be warranted by any proceſs? It is a very different caſe where a Plaintiff ſues out a writ as executor, to which the Defendant appears; for in ſuch caſe the Defendant is before the Court, at the ſuit of the perſon named in the writ, whether that perſon declare in his own right or in *auter droit*. The Defendant in this caſe has never been called upon to anſwer *J. Barber*, who cannot therefore require him to put in a plea.

Per Curiam, Rule abſolute.

Feb. 12th.

GOODTITLE ex dem. READ *v.* BADTITLE.

The mere acknowledgment of the wife of the tenant in poſſeſſion that ſhe has received a declaration in ejectment will not bind the huſband.

LE BLANC Serjt. moved for judgment againſt the caſual ejector on an affidavit of ſervice, ſtating that the deponent went to the houſe in queſtion, in order to ſerve the declaration, and was there informed by the niece of the wife of the tenant in poſſeſſion, that the tenant and his wife had been from home above three weeks, and that ſhe did not know where they were gone, or when they would return; that the deponent thereupon ſerved a copy of the declaration on the niece, and nailed another copy to the door of the houſe: and that the tenant's wife afterwards acknowledged to the deponent, that the declaration had come to her hands, and that ſhe had ſent the ſame to her huſband.

EYRE Ch. J. If a declaration be ſerved on the wife of the tenant in poſſeſſion, and ſhe neglect to deliver it to her huſband, he muſt anſwer for her default. But it would be going further than we have ever yet gone to admit the mere acknowledgment of the wife to bind the huſband.

Le Blanc took nothing by his motion (*a*).

(*a*) Sed vid. *Smith* ex dem. Lord *Stourton* and others *v. Hunt*, 1 *H. Bl.* 644.

1799.
Feb. 12th.

Goodtitle ex dem. Roberts and Wiſe *v.* Badtitle.

Service of a declaration in ejectment on a perſon appointed by the Court of Chancery to manage an eſtate for an infant, is not ſufficient.

To ſupport a ſimilar motion to that made in the laſt caſe *Le Blanc* Serjt. produced an affidavit of ſervice, by which it appeared, that the declaration was ſerved on one *John Rumbold Leeds*, who informed the deponent, that there was no tenant in poſſeſſion of the premiſes (which conſiſted of a large wood) but that he was appointed by the Court of Chancery to manage the ſame for the benefit of a minor, to whom it belonged, and that he cut and ſold the underwood.

The Court were of opinion that this ſervice was inſufficient: and that it amounted to no more than a ſervice on a gentleman's bailiff.

Le Blanc took nothing by his motion (*a*).

(*a*) But a notice to quit given by a receiver appointed under an order of Chancery, though it make no mention of the landlord, is ſufficient to ſupport an action for double rent under 4 *Geo.* 2. *c.* 28. *Wilkinſon* v. *Colley*, 5 *Burr.* 2694.

Mr. Juſtice Buller and Mr. Juſtice Heath were abſent during the whole of this term from indiſpoſition.

In this term John Vaughan of *Lincoln's-Inn* Eſq. was called to the Honourable Degree of Serjeant at Law, and gave rings with this motto,

"*Paribus ſe legibus ambæ.*"

END OF HILARY TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Eaſter Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

PEETERS *v.* THOGMORTON.

April 10th.

The Defendant may rule the Plaintiff to enter the iſſue, and move for judgment as in caſe of a nonſuit in the ſame term.

ISSUE having been joined in *Trinity* term laſt, but no notice of trial given, the Defendant in *Hilary* term ruled the Plaintiff to enter the iſſue, and then obtained a rule *niſi* for judgment, as in caſe of a nonſuit.

Runnington Serjt. ſhewed cauſe in *Hilary* term, and contended, that it was not competent to the Defendant to move for judgment as in caſe of a nonſuit in the ſame term, in which he had ruled the Plaintiff to enter the iſſue, ſince it would be obliging the Plaintiff to take two ſteps in one term. One of the Secondaries alſo ſtated the practice to be for the Defendant in ſuch caſes to wait till the next term.

Marſhall Serjt. *contrà* inſiſted, that as ſoon as the iſſue is actually entered, the Defendant has a right to move for judgment as in caſe of a nonſuit.

1799.

Peeters *v.* **Throg-morton.**

Eyre Ch. J. This is not obliging the Plaintiff to take two ſteps. The queſtion is, whether the Defendant be not entitled to avail himſelf of the Plaintiff's having omitted to take one ſtep, *viz.* to give notice of trial, within the number of terms preſcribed, as ſoon as he has brought himſelf into a ſituation to make the application? The motion proceeds on the ground of a neglect in the Plaintiff which has already taken place; and though the Defendant cannot move till the iſſue is in court, yet the delay of the Plaintiff is not purged by the Defendant's omitting to give a rule to enter the iſſue at an earlier period. Unleſs the practice be moſt clearly ſettled I never can yield to the objection.

Rooke J. however entertaining ſome doubts upon the practice, the caſe ſtood over till this term; when the *Court* over-ruled the objection. And *Rooke* J. added, that he entirely agreed in the reaſoning of the Lord Chief Juſtice, though as the practice had been ſuppoſed to be the other way, he had wiſhed the point to be conſidered.

Rule abſolute.

April 11th.

Scheibel *v.* Fairbain and Another.

An action on the caſe will not lie againſt a party ſuing out a writ, if he neglect to countermand it after payment of the debt: at leaſt unleſs malice be averred. Reaſonable time is a queſtion of law.

This was an action on the caſe. The declaration ſtated, that the Plaintiff being indebted to the Defendants in the ſum of 223*l.* 9*s.* 2*d.* the Defendants ſued out of this court a writ of *capias ad reſpondendum* to hold the Plaintiff to bail; that the Plaintiff afterwards paid to the Defendant the debt, and that thereupon "it became the duty of the ſaid Defendants to have forthwith countermanded the arreſt of the ſaid Plaintiff upon or by virtue of the ſaid writ, yet the ſaid Defendants, well knowing the premiſes but not regarding their duty in this behalf, did not nor would forthwith or at any time afterwards countermand the arreſt of the ſaid Plaintiff upon or by virtue of the ſaid writ, but *wrongfully neglected ſo to do.*" By means whereof the Plaintiff was arreſted and kept in priſon for ſeveral hours, and was put to great charges in procuring his liberty, &c.

Plea. General iſſue.

The cauſe was tried before *Heath* J. at the Guildhall Sittings after laſt *Michaelmas* term, when the ſuing out the *capias*, the making the affidavit to hold to bail, and the directing the warrant to the ſheriff's officers being eſtabliſhed, it was proved that on the 8th *October* the

Plaintiff went to the houſe of the Defendant *Fairbain* and paid the debt in queſtion: that on the next morning at 20 minutes paſt 10 he was arreſted at his own houſe, and carried to that of the officer. Nothing was ſaid, at the time when the money was paid, concerning the writ. The Defendant *Fairbain* lived in *Grafton-Street, Soho*, and there received the money, and in order to countermand the arreſt he had only to ſend from thence to *Titchfield-Street, Oxford-Street.* A countermand was in fact given by letter, though it did not arrive at the ſheriff's office until ſome time in the morning of the 9th of *October*, when all the officers were gone out with their warrants. A queſtion aroſe at the trial, whether the countermand had been given in reaſonable time. The learned Judge ruled this to be a queſtion of law; and that if it were incumbent on the Defendants to countermand the arreſt, as ſuppoſed by the pleadings, they ought to have done it in the courſe of the day in which they received the debt. The jury found a verdict for the Plaintiff. Damages 5*l*.

Sellon Serjt. in the courſe of laſt term obtained a rule to ſhew cauſe why a new trial ſhould not be had, on the ground of a miſdirection; but when the caſe was called on

Eyre Ch. J. ſaid, there could be no doubt of the direction of the learned Judge being perfectly correct, the queſtion of reaſonable time being for his deciſion and not for that of the jury. He ſuggeſted however, that as the declaration averred, that the Defendants had *wrongfully neglected* to countermand the writ, a motion might perhaps be ſupported in arreſt of judgment: in which caſe the queſtion would ariſe, whether the Defendants had ſuch a duty neceſſarily impoſed upon them to countermand the writ inſtantly on the ſatisfaction of the debt as made them guilty of *wrongful neglect*, in caſe of the Plaintiff ſuffering any damage by their omiſſion; or whether they had by law a reaſonable time to perform that duty which did not appear to have been exceeded?

Rooke J. was of the ſame opinion as to the direction of the learned Judge, thinking reaſonable time a queſtion of law, not of fact: for this he cited 13 *Co.* 3. *Bract. lib.* 2. *fol.* 51. (*a*) and *Cro. Car.* 14.

(*a*) The paſſage in *Bracton* is, rather incorrectly, cited in the margin of *Coke* thus; "*Quàm longum debet eſſe tempus non definitur* "*in jure, ſed pendet ex juſticiariorum diſcretione*"; as if it applied to time in general, whereas it only relates to the length of poſſeſſion neceſſary to confer a title, and runs thus; "*Quàm longa* (*ſcilicet* poſſeſſio) *eſſe debeat non definitur à jure, ſed ex juſtitiariorum diſcretione.*"

Accordingly

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SCHEIBEL *v.* FAIRBAIN.

Accordingly the rule for a new trial having been diſcharged, and a rule *niſi* for arreſting the judgment granted,

Shepherd Serjt. now ſhewed cauſe. Upon this motion in arreſt of judgment, the conſideration of reaſonable time is out of the queſtion: and whatever tends to ſhew that the Defendant had no opportunity of countermanding the writ, is evidence to rebut the Plaintiff's allegation of wrongful neglect. Here the queſtion is general, whether a party to whom a debt has been paid, and who does not prevent the execution of a writ, be liable to an action: if the declaration had ſtated, that the Defendant without ſufficient reaſon cauſed the ſheriff to execute the writ, it would clearly have been good: in which caſe, evidence that he neglected to countermand the writ, might have amounted to cauſing the ſheriff to execute it; ſince there can be little difference between cauſing the ſheriff to arreſt without reaſon, and omitting to prevent the arreſt when the reaſon which did exiſt has ceaſed. In actions for malicious arreſts, the giſt of the action is the arreſt: neither making the affidavit of debt, ſuing out the writ, or putting it into the hands of the ſheriff will ſupport the action, unleſs an arreſt follow; and whether ſuch arreſt be occaſioned by the actual malfeaſance of the Defendant, or by his nonfeaſance in omitting to do the neceſſary acts to prevent it, makes no difference in principle. *Hobart* in his report of *Waterer* v. *Freeman*, 267. ſays, "Likewiſe I hold that I "may have an action upon the caſe againſt him that ſues me "againſt his releaſe or after the money duly paid." Every man is bound to ſtop the continuation of any act ſet on foot by himſelf as ſoon as it becomes injurious to another.

Sellon Serjt. in ſupport of the rule. This is an action of the firſt impreſſion, and if not bad upon the general principle, cannot be ſupported in the way in which it is ſhaped. 1ſt, The action is founded on a ſuppoſed duty which the Plaintiff ought to have performed; that duty however muſt ariſe from a legal obligation; a mere moral obligation will not ſuffice. The writ having been ſued out by the Defendants for a debt actually due, they were not bound to accept the ſatisfaction tendered; having accepted it and thereby granted an indulgence which the law could not have compelled, it cannot be contended that ſuch indulgence ſhall impoſe a new duty upon them. The *dictum* in *Hobart* applies only to the caſe of a new writ ſued out ſubſequent to ſatisfaction accepted. Beſides it was the buſineſs of the Plaintiff to have taken care that the writ was countermanded, and no perſon can maintain an action againſt another for damage ſuſtained in conſequence of his own neglect. *Virtue* v. *Birde*, 2 *Lev.* 196. 1 *Vent.* 310. S. C. 3 *Keb.* 766. S. C. *Bayly* v. *Merrel*, *Cro. Jac.* 386. 1 *Roll. Rep.* 275. S. C. and in *Paiſley* v. *Freeman*, 3 *Term Rep.* 51. the ſame principle is recognized. 2dly, This action cannot be maintained in the way in which it is ſtated on this record. It can only be ſupported on the ground of malice, which muſt be averred in the declaration. *Goſlin* v. *Wilcock*, *C. B.* 2 *Wilſ.* 302. There ſhould alſo have been an averment that the writ was not countermanded in reaſonable time; for ſuppoſing the writ to be ſent into the country and the debt to be paid in town, it may be impoſſible for a Plaintiff to countermand it before execution.

Eyre Ch. J. It is agreed that this is an action of the firſt impreſſion, and it ſtrikes me at preſent that it cannot be ſupported. It is not founded on any injury wilfully committed by the Defendants, but on a mere non-feaſance. The writ having been regularly ſued out, a tender was made, which it is clear theſe Defendants might have refuſed to receive. However they think proper to accept it. Upon this, was it not the buſineſs of the Plaintiff to inquire whether any writ had been ſued out, and offering to pay whatever coſts were incurred thereby, to deſire a countermand which he might take to the ſheriff? The Plaintiff ought not to have truſted to a countermand of the writ by the Defendants, but to have obtained it for himſelf by his own dilligence: it appears that the Plaintiff has been the occaſion of all the inconvenience which he has ſuffered; for, having made it neceſſary in the firſt place, by his neglect to pay a juſt debt, that the writ ſhould be ſued out, he did not prevent its conſequences by taking the countermand into his own hands. If the cauſe had proceeded, the offer to ſatisfy the debt could not have been pleaded as a tender. Without the ingredient of malice this action cannot be ſupported, and I think, in a caſe new as this is, and where mal-feaſance and non-feaſance are attempted to be confounded, the Court ought to incline againſt it. Had the Defendants refuſed or wilfully neglected to countermand the writ, it might have afforded evidence on an averment of malice by which ſuch an action might have been ſuſtained; but without ſuch averment the Court ſhould be extremely cautious of ſubjecting a party to damages for mere non-feaſance. I am more inclined to remain upon that ground which has been already

trodden,

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Schneibel v. Fairbain.

trodden, than to open a new field for litigation, of which it is not eaſy to ſee the extent.

Buller J. Under ſome of the circumſtances ſtated by my Lord, I think an action might be maintained, though of a different complexion from the preſent. If any converſation had taken place between the parties at the time when the debt was ſatisfied, or any thing had paſſed from which an undertaking to countermand might have been inferred, and the coſts of the writ had been paid, that might have afforded ground for an *aſſumpſit*, and payment of the coſts would have been a ſufficient conſideration. But this is an action for mere non-feaſance; now in order to ſupport ſuch an action, ſome duty muſt be ſhewn to have attached on the Defendants. Here however the Plaintiff himſelf ſeems to have been guilty of great negligence, not having taken a diſcharge or receipt for his debt, which of itſelf would have been a ſufficient anſwer to any arreſt. The poſition contended for, is, that where a party in ſuch a caſe as this receives his debt, the law impoſes an obligation on him to countermand the writ. But that countermand may be attended with ſome expence, and where is the authority to ſhew that a man who only receives his due is under any obligation to incur expence? The caſe was well put of a writ ſent into the country, and an arreſt after a payment in town; for the Court can make no diſtinction between that which is to be done at the diſtance of 100 yards, and that which is to be done at the diſtance of 100 miles. The queſtion is, whether the receipt of the debt impoſed any obligation to incur expence?

Heath J. I am of the ſame opinion. This action is founded on mere non-feaſance, and no caſe or precedent has been cited to ſhew that ſuch an action was ever maintained. All the caſes of arreſts and holding to bail without cauſe are founded on malice. Had any thing paſſed in converſation with reſpect to a countermand of the writ, that might have been evidence of malice. At all events the party was not bound in this caſe to ſtop the action until the coſts were tendered.

Rooke J. I am of the ſame opinion. An action of this kind cannot be ſupported, unleſs malice be alleged and proved.

Rule abſolute.

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April 12th

PARKIN *v.* RADCLIFFE.

Evidence that the homage have been accuſtomed to aſſeſs a certain ſum of money *as a heriot* upon alienation, and that ſuch aſſeſſment has always been made with reference to the beſt chattel of the tenant, will not ſupport an avowry for a heriot in kind upon alienation.

THESE parties having gone to trial upon the iſſues joined according to the intention intimated by them when the caſe was before the Court on a former occaſion (*a*), the cauſe came on before *Thompſon* Baron at the Spring Aſſizes for *York*, when a verdict was found for the Plaintiff.

Cockell Serjt. now moved for a new trial on two grounds, 1ſt, A miſdirection of the Judge, 2dly, His having rejected evidence which ought to have been admitted. He ſtated the circumſtances at the trial to have been as follow. The Defendant having given parol evidence to ſhew that heriots had always been taken on alienation, and that ſeveral ſeizures had been made, produced certain entries from the year 1667 to the year 1794; theſe for the moſt part were entries of ſums aſſeſſed by the jury of the manor for *heriots* or *fines of heriots* (both terms being uſed in the Rolls) on alienation; one however dated the 31ſt *May* 1667 was in the following form "*Thomas Haigh* one old cow for a fine "of a harriott for *William Jackman* of *Halifax* upon alienation 1 *l.*" It was not diſputed that heriots were due on deſcent: in order therefore to make theſe entries ſupport a right to a heriot on alienation, and to explain the term "fine of heriot" therein uſed, the Defendant offered to prove, that by the cuſtom of the manor, appraiſers had always been appointed upon the death of every tenant to appraiſe his effects; that the jury had then inquired which was the beſt chattel of the deceaſed, and declared it to be a heriot due to the lord; after which they had proceeded to ſet a price upon it, in doing which they had always followed the valuation of the appraiſers: and he produced the rolls of the manor relating to deſcent, in which was the following entry dated 15th *April* 1661 among others of a ſimilar nature "*John Marſden*'s death "preſented, and that a cow was the beſt of his goods at his death, "and of the value 11 *l. que prædict' vacca deliberari debet Dmo* "*maner' pro herioto ſuo.*" This laſt evidence was rejected by the learned Judge, who treated all the entries as evidence of mere money payments, and ſaid that the only queſtion to be tried by the jury was, whether a heriot in kind were due? For that the

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(*a*) Vid. *ante* 282.

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v.
Radcliffe.

lord having claimed a ſpecific thing, if not entitled to that muſt fail in his avowry (*a*)

Eyre Ch. J. Had I been in the place of the learned Judge, I am not quite certain that I ſhould have rejected the evidence; but had I received it I ſhould have found myſelf obliged to turn the application of it againſt the Defendant. The entries in queſtion tend to ſhew, that no heriot in kind is due even in the caſe of deſcent, but a pecuniary payment only. Whether the jury in eſtimating the ſum to be paid refer to the value of the beſt chattel, or whether they aſſeſs a ſum in groſs, it is equally clear that the lord receives nothing in ſpecie. The right of the tenant to have a ſum aſſeſſed in lieu of the chattel is inſeparable (*b*) from the right of the lord: the right of the latter therefore is not an abſolute right to the chattel, but to ſomething to be commuted for it by the jury.

Cockell took nothing by his motion.

(*a*) On a juſtification by the lord of the manor, under a cuſtom, that the lord ſhould have the beſt beaſt on the tenant's death the cuſtom proved was, that the lord ſhould have the beſt beaſt or good &c. and the whole Court of *C. B.* held the variance fatal. *Adderley* v. *Hart*, *T.* 4 *Geo.* 1.

(*b*) Vid. *Gray's* caſe, 5 *Co.* 78. *b.* in which it was held, that where a party preſcribes abſolutely, and the evidence is of a preſcription under a condition or limitation, if ſuch condition or limitation be parcel of the preſcription, it is a variance: *ſecùs* if not parcel.

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Brandon *v.* Brandon.

An attachment for not paynig a ſum of money purſuant to an award cannot iſſue before a perſonal demand has been made; even though the time and place for payment of the money awarded be ſpecified in the award.

Williams Serjt. in the courſe of laſt term ſhewed cauſe againſt a rule obtained by *Marſhall* Serjt. for an attachment for not paying a ſum of money purſuant to an award, and contended, that though it was awarded that the party ſhould pay the money at a particular time and place, *viz.* between the hours of 10 and 12 on a certain day, at the *Baptiſt-head Coffee-houſe*, yet that a perſonal demand and tender of a releaſe, which were neceſſary, not having been made, the attachment could not iſſue.

Eyre Ch. J. The reaſon for naming a particular time and place is, to superſede the neceſſity of a perſonal demand, and I know of no authority that in ſuch caſe any demand need be made.

Rooke J. This objection would afford no anſwer to an action on the award, but I think it was held in the time of Mr. Juſtice *Gould*, that a perſonal demand muſt be ſhewn in applications to the ſummary juriſdiction of the Court.

It having been alſo ſuggeſted at the bar that ſuch a practice had prevailed, the caſe was ordered to ſtand over till the bench ſhould be full.

On this day the caſe was again mentioned, when the Court declared themſelves of opinion, that a perſonal demand was neceſſary to warrant the iſſuing of the attachment, but

EYRE Ch. J. ſaid, that though he ſubmitted to the practice, he continued to think that on principle a perſonal demand was unneceſſary.

Rule diſcharged without coſts (*a*).

Sir HARRY GORING Bart. *v.* WELLES, Clerk.

April 12th.

If ſeveral perſons who have purchaſed annuities of *A.* agree to give up theſe annuities on receiving a certain ſum of money and a bond payable at a future day, they retaining their annuity ſecurities till the bond becomes payable, the Court cannot under the 17 *Geo.* 3. *c.* 26. order any of the ſecurities ſo retained to be delivered up, although they may be void. At leaſt not unleſs the creditors attempt to ſet them up again as annuity ſecurities on non-payment of the ſtipulated ſum or the bond's proving bad. *Semb.* That after payment of the money and delivery of the bond to the creditors, their debt is ſatisfied whether the bond prove good or bad.

THE Defendant having granted ſeveral annuities which he was unable to pay, on the 3d of *September* 1798 entered into an agreement to give up to the Plaintiff and ſeveral other annuity creditors 800*l.* in caſh, and a bond for 1020*l.* with intereſt from the 14th *December* 1798, payable to the Defendant on the 14th *June* 1799, to be divided amongſt them on the 1ſt *July* in the ſame year. The bond was to be placed in a banker's hands as the property of the annuity creditors, they being at liberty to hold the ſecurities for their reſpective annuities till the time of payment, and ſigning an undertaking to make void and deliver up the ſecurities at ſuch time of payment. Among theſe ſecurities was a warrant of attorney to confeſs judgment given by the Defendant to the Plaintiff, for the purpoſe of ſecuring an annuity of 100*l.*

A rule having been obtained in the laſt term, calling on the Plaintiff to ſhew cauſe why this warrant of attorney ſhould not be delivered up to be cancelled; 1ſt, Becauſe at the time when the Defendant executed it he was not aware that it was a ſecurity for an annuity; 2dly, Becauſe the conſideration for the annuity had never been paid,

Shepherd Serjt. now ſhewed cauſe, and urged that as the annuity had been put an end to by the agreement between the Defendant and his creditors, the warrant of attorney now ſtood as a ſecurity

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(*a*) Vid. 12 *Mod.* 257. *Anon. C. B.* where it is ſaid by the Court, that there muſt be a poſitive affidavit of perſonal notice of award and demand of the money all at one time, becauſe it brings the party into contempt. *Vid. etiam King* v. *Tooley*, 12 *Mod.* 312. *K. B.*

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Goring v. Welles.

for the money actually advanced, and conſequently could not be affected by the proviſions of the annuity act. He added, that a caſe under the ſame circumſtances had been before the King's Bench on that day, in which the rule was diſcharged.

Le Blanc Serjt. in ſupport of the rule contended, that in caſe a dividend ſhould not be made among the creditors on the 1ſt of *July* according to the agreement, the warrant of attorney would remain in full force as a ſecurity for the annuity, and execution might be taken out upon it: and that being defective within the proviſions of the annuity act, the Court ought not to ſuffer it to continue in the Plaintiff's hands.

Eyre Ch. J. It is one thing, whether the Court ought to ſet aſide theſe ſecurities, conſidered as ſecurities for a ſubſiſting annuity, and another, whether it ought to entertain this application, after the annuity has been abandoned and a new agreement entered into for the repayment to the grantee of the principal ſum. In the former caſe the objections now made might have prevailed; but in my apprehenſion, this motion has been made in breach of good faith, and in contravention of that new agreement between the parties, to inſure the performance of which the annuity ſecurities were to remain in the hands of the grantees. It is true that it may be urged as an argument, that the grantee, in caſe the ſtipulated payments ſhall not be duly made on the 1ſt of *July*, will attempt to reſort to the ſecurities as annuity ſecurities: but ſhould he do ſo it will then be time to apply to the Court to interfere as in the caſe of a ſubſiſting annuity. Here the annuity having been abandoned, the motion now before the Court is made for a purpoſe quite collateral to 17 *Geo.* 3. *c.* 26. The conſtruction put upon that act has never been carried to the length of ſaying that the grantee ſhall not get back his money.

Buller J. I think it perfectly clear that the warrant of attorney was objectionable at the time when the annuity was granted: but the queſtion is, whether any thing has ſince been done to wave the objections? Unqueſtionably the grantee may wave them if he thinks fit. Here a new agreement has been entered into, by which the annuity was turned into a money debt. This amounted to a waver of the objections. The argument in ſupport of the rule proceeds on the ſuppoſition of a caſe which never occurred, nor do I think that it ever could occur. It having been ſettled that the warrant of attorney ſhould remain as a ſecurity for the new agreement, it muſt ſo remain; nor can it ever be reſorted to again to enforce the annuity. From the moment that the 800*l.* was paid over and the bond delivered into the banker's hands, there was an end of the whole debt, and the creditors were to run the riſk of the bond being good or bad. It is true that there can be no uſe in leaving the warrant of attorney in the hands of the party, but the Court cannot order it to be delivered up.

The Court were inclined to diſcharge the rule with coſts, but finding that the Court of King's Bench had not done ſo in the caſe alluded to,

Diſcharged the rule without coſts.

POULTER *v.* KILLINGBECK.

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A. agreed with *B.* to let him land rent-free on condition that *A.* ſhould have a moiety of the crops; while the crop was on the ground it was appraiſed for both parties; *A.* declared in *indebitatus aſſumpſit* for a moiety of the value of the crop ſold to *B.* without ſtating the ſpecial agreement; and held that he might well do ſo, as the ſpecial agreement was executed by the appraiſement and the action aroſe out of ſomething collateral to it. *Semb.* That ſuch an agreement need not be in writing under the ſtatute of frauds.

INDEBITATUS aſſumpſit. The 1ſt count of the declaration was, "for 20*l.* for the moieties of divers crops of wheat and cole-ſeed, by the Plaintiff before that time ſold to the Defendant, and by the Defendant in conſequence of ſuch ſale before then had reaped and taken to and for his own uſe and benefit." The 2d count was on a *quantum meruit*, "for that the Plaintiff had permitted and ſuffered the Defendant to depaſture, eat up, and conſume with his cattle the moiety of a certain other crop of cole-ſeed." There was alſo a count for money had and received. Plea. General iſſue.

The cauſe was tried before *Aſhhurſt*, J. at the laſt *Cambridge* Spring Aſſizes, when it appeared that the Plaintiff being poſſeſſed of certain pieces of fenn-land which he was deſirous of having put into a ſtate of cultivation, made a verbal agreement to let them to the Defendant without rent, who was to plough, dreſs and ſow them for two ſucceſſive crops, and in lieu of rent to allow the Plaintiff a moiety of the crops. While the crops of the ſecond year were on the ground an appraiſement of them was taken for both parties, and the value aſcertained. The Defendant having afterwards refuſed to pay a moiety of the value, this action was brought. It was contended, at the trial, that a ſpecial agreement for a moiety of the crops having been proved, this action of *indebitatus aſſumpſit*, for a moiety of the value, could not be ſupported: and alſo that the agreement itſelf was within the ſtatute of frauds; firſt, becauſe it related to land, and ſecondly, becauſe it was not to be executed within a year; and that it ought therefore to have been in writing. A verdict was found for the Plaintiff ſubject to the opinion of the Court on the firſt objection.

Accordingly, *Sellon* Serjt. now moved for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide and a nonſuit be entered.

Eyre Ch. J. The circumſtance of the appraiſement ſeems to put an end to this point. It is true that as the caſe originally ſtood the Plaintiff had a claim to a moiety of the produce of the land under a ſpecial agreement: but that ſpecial agreement was executed by the appraiſement. It had been agreed that the moiety of the crops was the property of the Plaintiff; but he being willing that the Defendant ſhould keep them, a ſurveyor was appointed to ſettle the price between them. The circumſtance of the appraiſement affords clear proof that the Plaintiff ſold what the Defendant had agreed was his: and the price being aſcertained, brings this to the caſe of an action for goods ſold and delivered.(*a*) It is unneceſſary to ſtate a ſpecial agreement, which has been executed, where the action ariſes out of ſomething collateral to it.

Buller J. If no appraiſement had taken place, the objection to the action in this form muſt have prevailed. But that circumſtance is deciſive. With reſpect to the point made at the trial, on the ſtatute of frauds, this agreement does not relate to any intereſt in the land, which remains altogether unaltered by the arrangement concerning the crops.

Sellon took nothing by his motion.

(*a*) An agreement executed often amounts to a bargain and ſale. *Com. Dig.* tit. *Agreement* (A 2). *Dict.*

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Roberts and Others, Aſſignees of Horsman a Bankrupt, *v.* Eden.

A note payable on demand with intereſt drawn by *A.* in favour of *B.* as a ſecurity for a debt, was by him indorſed to *C.* for the ſame purpoſe; after the indorſement it paſſed backwards and forwards between *B.* and *C.* ſeveral times, and previous to its being ultimately depoſited with *C.* he received an intimation from *B.* not to negotiate it as he ſhould want it when he ſettled accounts with *A.*; held that *C.* could not, after a ſettlement of accounts between *A.* and *B.* without a redelivery of the note, recover on it againſt *A.*

Action by the aſſignees of the indorſee of a promiſſory note againſt the drawer; the note was for 400 *l.* dated the 20th of *April* 1792, and made payable to one *Hunt* on demand, with lawful intereſt, and had been indorſed by him to the bankrupt, *Horſman.*

It appeared at the trial before *Rooke* J. at the Guildhall Sittings in this term, that the note in queſtion was given by the Defendant

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v.
EDEN.

ant *Eden* to *Hunt*, (who was a banker,) for money borrowed; that *Hunt* indorſed it over to *Horſman* as a ſecurity for money advanced in the courſe of trade; that in 1793 *Hunt* and *Eden* ſettled accounts and the balance was paid, but the note in queſtion was not aſked for or delivered up; that the note had paſſed backwards and forwards ſeveral times between *Hunt* and *Horſman*, during all which time the former was indebted to the latter in more than 400*l.*; and that *Hunt* upon one occaſion (the date of which did not appear, but which was before the laſt time the note was depoſited) told *Horſman* that it muſt not be negotiated, as he ſhould want it when he ſettled accounts with *Eden*. For the Defendant it was contended, that as the note had been taken out of *Horſman*'s poſſeſſion, and again placed in his hands ſo long after it bore date, and with an intimation not to negotiate it, it was taken under ſuch circumſtances of ſuſpicion as ought to have induced him to make ſome inquiry concerning it; and it was compared to a bill of exchange negotiated after it has become due, in which caſe the holder muſt ſtand upon the title of the perſon from whom he receives it. On the part of the Plaintiff it was inſiſted, that there was no analogy between a bill payable on a day certain and this note, which being made payable on demand, with lawful intereſt, was intended as a permanent ſecurity; that the intimation given by *Hunt* to *Horſman* not to negotiate the note, as he might want it when he ſettled accounts with *Eden*, ſo far from being a circumſtance to raiſe ſuſpicion, amounted to ſaying that an open account exiſted between *Hunt* and *Eden*, and that the note had not been paid; that *Eden* ought, under theſe circumſtances, to ſuffer for his own neglect in not getting the note back when he ſettled accounts with *Hunt*. The jury found a verdict for the Defendant.

Le Blanc Serjt. now moved for a rule *niſi* for a new trial, on the part of the Plaintiff, and contended, on the grounds above ſtated, that the verdict was contrary to law and evidence.

EYRE Ch. J. It is clear that this note was not regularly negotiated from *Hunt* to *Horſman*, ſo as to give the latter an abſolute property in it, but only ſo as to give him a ſecurity to the amount of the balance due from the former. Suppoſe this to have been the caſe of a bond: it would have been in the nature of a pledge, and good for nothing after the debt had been ſatisfied. The queſtion then is, whether there be any difference between a bond,

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and a note circumſtanced like the preſent, which has been placed in the hands of a creditor as a mere ſecurity for his debt, except that the latter may be put in ſuit in the name of the holder, but the former muſt be ſued in the name of the principal? When the note was put into the hands of *Horſman*, he was told that he muſt not conſider it as his own, for that *Hunt* might want it when he ſettled accounts with the Defendant. I agree with my Brother, *Le Blanc*, that this circumſtance did not import that the note had been paid at that time, but it is deciſive to ſhew that it was not negotiated to *Horſman*, but only depoſited with him as a pledge; the conſequence of which is, that it muſt remain in his hands ſubject to the ſame equity as if it were in the hands of the original payee. However, as I underſtand that the verdict did not paſs to the entire ſatisfaction of the learned Judge who tried the cauſe, there can be no objection to our granting a rule to ſhew cauſe.

BULLER J. There are many ſituations in which one man is bound to ſtand in the place of another; and this ſeems to me to be one of the cleareſt caſes that ever came before the Court. Here is direct evidence that *Hunt* told *Horſman* that he muſt not negotiate the note, as he ſhould want it when he ſettled accounts with the Defendant. Did not that amount to ſaying, "The Defendant has a charge and lien on the note: you muſt not conſider it as caſh, but muſt ſtand in my ſituation." It is impoſſible to underſtand the words in any other way.

ROOKE J. Though the verdict was not altogether agreeable to my directions to the Jury, I cannot ſay that I was diſſatisfied with it. The caſe was not conſidered, at the trial, in the light in which it has been viewed by my Lord and my Brother *Buller*; but I entirely concur in their opinion.

Le Blanc finding the opinion of the Court againſt him, declined taking a rule to ſhew cauſe.

April 22d.

HOLCROFT *v.* HEEL.

If the grantee of a market under letters patent from the crown, ſuffer another to erect a market in his neighbourhood and uſe it for the ſpace of twenty-three years without interruption, he is by ſuch uſer barred of his action on the caſe for diſturbance of his market.

Quære. Whether if no ſpecific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in ſuch caſe he can ſupport any action for an injury to his market?

ACTION on the caſe: For that whereas the Plaintiff, on the 1ſt day of *March* 1798 and before, was and from thence hitherto hath been and ſtill is lawfully poſſeſſed of a certain cloſe, called

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called *Market Cloſe* in *Northcott*, otherwiſe *Southall*, in the county of *Middleſex*, and of a market holden, and to be holden there, in or upon every *Wedneſday*, for the buying and ſelling of horſes and all other kinds of cattle, together with toll, ſtallage and other commodities, to ſuch like market appertaining; whereby great gains, profit and advantages, during all the time aforeſaid, untill the committing of the grievance hereafter next mentioned, accrued to and were received by the ſaid Plaintiff, to wit, at, *&c.* yet the Defendant well knowing the premiſes, but contriving and fraudulently intending craftily and ſubtilly to deceive and defraud the ſaid Plaintiff, and to deprive the ſaid Plaintiff of the profits emoluments and advantages which he might and ought to have had and enjoyed from his ſaid market, whilſt the ſaid Plaintiff was ſo poſſeſſed of his ſaid market, to wit, on *Wedneſday* the 7th day of *March* 1798, and on divers other *Wedneſdays* between that day and the day of ſuing out the original writ of the ſaid Plaintiff, being days on which the ſaid market of the ſaid Plaintiff ought to be held and was held, at *&c.* wrongfully and injuriouſly and without any legal warrant or authority whatſoever, at *Hayes*, in the ſaid county of *Middleſex*, near to *Northcott*, otherwiſe *Southall* aforeſaid, and within three miles of the ſaid place where the ſaid market of the ſaid Plaintiff was ſo held and ought to be held as aforeſaid, levied and erected and cauſed to be levied and erected a certain other market for the buying and ſelling of cattle, and then and there wrongfully and injuriouſly, and without any legal warrant or authority whatſoever, held and kept the ſaid laſt-mentioned market, whereby divers great quantities of cattle were then and there brought to, and bought and ſold at, the ſaid market ſo levied, erected, held and kept as laſt aforeſaid; which otherwiſe on thoſe days to the aforeſaid market of the ſaid Plaintiff would have been brought to be there ſold, and divers butchers and other perſons were induced to reſort to the ſaid market ſo levied erected held and kept at *Hayes*, as laſt aforeſaid, and there to buy cattle who would otherwiſe have reſorted to the ſaid market of the ſaid Plaintiff at *Northcott*, otherwiſe *Southall* aforeſaid, and there bought cattle, to the great damage of the ſaid Plaintiff, and to the great nuiſance and detriment of the ſaid market of the ſaid Plaintiff, by reaſon whereof the ſaid Plaintiff was greatly annoyed and diſturbed in the exerciſe and enjoyment of his ſaid market, and loſt, and was deprived of divers great ſums of money, amounting in the whole to a large ſum of money, to wit, the ſum of 100*l.* which otherwiſe

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otherwiſe would have accrued to him, and he would have had and received from the toll ſtallage and other commodities to his ſaid market appertaining and belonging; to wit, at, &c.

There were nine other counts ſtating the market at *Southall*, and the injury thereto in different ways.

Plea. Not Guilty.

At the trial before *Eyre* Ch. J. at the *Weſtminſter* ſittings, after laſt Hilary term, it was proved, that the Plaintiff was leſſee of this market at *Southall*, the title to which was founded on letters patent of the 10 *W.* 3., which, after reciting an inquiſition by writ of *ad quod damnum*, proceeded thus: *Dedimus et conceſſimus ac per preſentes pro nobis hæredibus et ſucceſſoribus noſtris, damus et concedimus præfato* F. M. *et hæredibus ſuis, liberam et licitam poteſtatem licentiam et authoritatem quod ipſe et hæredes ſui habeant teneant* &c. *unum mercatum in vel ſuper quemlibet diem* Mercurii *in perpetuum, ac etiam duas ferias ſive nundinas annuatim*, &c. *unà cum curiâ pedis pulverizati ac omnibus libertatibus liberis conſuetudinibus poteſtatibus cuſtumagiis theoloniis ſtallagiis piccagiis et aliis commoditatibus ad hujuſmodi mercatum ferias ſive nundinas et curiam pedis pulverizati pertinentibus ſeu ſpectantibus;* that the Defendant was leſſee of certain penns erected in the year 1775 at *Hayes*, within two miles of *Southall*, in conſequence of a quarrel between the ſaleſmen and the proprietor of *Southall* market; and that cattle had been ſold in thoſe penns on every *Wedneſday* ſince that time. Two objections were taken to the Plaintiff's recovery; 1ſt, That as no ſpecific toll was mentioned in the letters patent, the Plaintiff was entitled to no toll, and therefore had ſuſtained no injury; 2dly, that after an undiſturbed poſſeſſion of this market at *Hayes*, by the Defendant for twenty-three years, the preſent action could not be maintained. The Lord Chief Juſtice nonſuited the Plaintiff, giving him leave to move to ſet that nonſuit aſide, and if the Court ſhould think he ought to have recovered, then a verdict to be entered for him with 1*s.* damages.

Accordingly, *Le Blanc* Serjt. early in this term moved for a rule *niſi* for that purpoſe, and urged, 1ſt, that it was not neceſſary in a grant of toll to ſpecify the particular ſums to be paid, *Palm.* 86. (*a*); that by the words of the letters patent ſuch toll having

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(*a*) This was the opinion of three Juſtices (ſee alſo the *Regiſter*, p. 103); but *Mountague* Ch. J. held the contrary, and in *Palm.* 79. ſaid that it was agreed by *Popham* in *Heedie*'s caſe (ſee *Heddy* v. *Wheelhouſe*, *Cro. Eliz.* 558 and 591.) that the King ought having been granted as was uſually taken at markets of this kind, the Plaintiff was entitled to take reaſonable toll, and that if he exacted unreaſonable toll he did it at the peril of forfeiting his market. 2dly, Suppoſing the Plaintiff not entitled to toll, yet that as he had an undoubted right to the market at *Southall*, the levying another market within two miles interfered with that right, and was an injury for which an action might be maintained, as in the caſe of a commoner who may maintain an action for injury to his common, though he have no cattle to put in (*a*). 3dly, That the only ground on which the Defendant's poſſeſſion of the market for more than twenty years could defeat the Plaintiff's right of action, was the preſumption which it afforded of a grant; but that all ſuch preſumption had been rebutted in this caſe by the proof which was given at the trial of the commencement of the Defendant's market.

The Court inclined againſt the Plaintiff's application, but granted a rule to ſhew cauſe.

On this day the caſe was to have been argued by *Le Blanc* and *Shepherd* Serjts. for the Plaintiff; and *Cockell*, *Runnington*, and *Sellon*, Serjts. for the Defendant.

But **Eyre** Ch. J. intimating a decided opinion, that the undiſturbed poſſeſſion of the market by the Defendant for twenty-three years was a clear bar to the Plaintiff's right of action, the counſel for the Plaintiff declined arguing the caſe.

Per Curiam, Rule diſcharged.

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ought to determine the *quantum* of toll. *Moore* 474. S. C. In *Oſbuſton* v. *James* and others, 2 *Lutw.* 1377. where the ſame words were uſed in the grant as in the preſent caſe, the ſame objection was taken, but judgment was given on another point.

A grant of ſuch toll to be taken at two bridges, as is uſed to be taken, *ibi et alibi infrà regnum Angliæ* was held uncertain and void in *Lightfoot* v. *Lenet*, *Cro. Jac.* 421.

(*a*) Vid. *Wells* v. *Watling*, 2 *Bl.* 1233.

April 22d.

Bush *v.* Steinman.

Idem et Ux. *v.* Eundem.

A. having a houſe by the road ſide, contracted with *B.* to repair it for a ſtipulated ſum; *B.* contracted with *C.* to do the work; and *C* with *D.* to furniſh the materials. The ſervant of *D.* brought a quantity of lime to the houſe and placed it in the road, by which the Plaintiff's carriage was overturned. Held that *A.* was anſwerable for the damage ſuſtained.

These were two actions on the caſe againſt the Defendant for cauſing a quantity of lime to be placed on the high road, by means of which the Plaintiff and his wife were overturned and much hurt, and the chaiſe in which they then were was conſiderably damaged. Pleas. Not-guilty.

The two actions came on together to be tried before *Eyre* Ch. J. at the Guildhall Sittings after laſt *Hilary* term, when the following circumſtances appeared in evidence. The Defendant having purchaſed a houſe by the road ſide, (but which he had never occupied,) contracted with a ſurveyor to put it in repair for a ſtipulated ſum; a carpenter having a contract under the ſurveyor to do the whole buſineſs, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whoſe ſervant the lime in queſtion was laid in the road. The Lord Chief Juſtice was of opinion that the Defendant was not anſwerable for the injury ſuſtained by the Plaintiff under the above circumſtances; but in order to ſave expence, a verdict was taken for the Plaintiff for 12 *l.* 12 *s.* with liberty to the Defendant to move to have a nonſuit entered.

Accordingly a rule *niſi* for that purpoſe having been obtained on a former day,

Cockell and *Shepherd* Serjts. now ſhewed cauſe. The queſtion is not whether this action might not have been brought againſt ſome other perſon, but whether it cannot be maintained againſt the preſent Defendant. It is ſufficiently eſtabliſhed that maſters are civilly anſwerable for the neglect of their ſervants, though abſent at the time of the injury committed. *Hern* v. *Nicholls*, 1 *Salk.* 289. *Jones* v. *Hart*, 2 *Salk.* 441. So it is with carriers and owners of ſhips. The houſe in this caſe was undergoing repair for the Defendant, and the act which cauſed the injury complained of, was an act done for his benefit, and in conſequence of his having authoriſed others to work for him. Though the perſon by whoſe neglect the accident happened was the immediate ſervant of another, yet for the benefit of the public he muſt be conſidered as the ſervant of this Defendant. The maxim in law is *reſpondeat ſuperior;* and accordingly Lord *Kenyon* in a caſe ſtrongly analogous to the preſent ſaid "In all theſe caſes I have ever underſtood that the action "muſt either be brought againſt the hand committing the injury "or againſt the owner for whom the act was done." *Stone and another* v. *Cartwright*, 6 *Term Rep.* 411. If this Defendant be not liable, the Plaintiff may be obliged to ſue all the parties who have ſubcontracts in this caſe, before he can obtain any redreſs for the injury he has ſuſtained.

Le Blanc and *Marſhall* Serjts. *contrà.* The Plaintiff contends, firſt, that a perſon is liable for the conſequences of every act done for his benefit; at leaſt if the act take place on his own premiſes: ſecondly, that he is anſwerable for any injuries committed by thoſe whom he employs, if the injuries happen in the courſe of carrying into execution the commiſſion with which they are charged. Firſt, it is clear that the cauſe of action did not in this caſe ariſe on the Defendant's premiſes, the complaint being, that a quantity of lime which ſhould have been placed there, was actually laid in the high-road: that being the caſe, there is no authority to ſhew that the Defendant is liable, merely becauſe the act from which the injury aroſe was done for his benefit. If that general propoſition were true, it might be contended, that the Defendant muſt have anſwered for any accident which might have happened during the preparation of the lime in the lime-burner's yard. Secondly, The liability of the principal to anſwer for his agents, is founded in the ſuperintendence and control which he is ſuppoſed to have over them. 1 *Black. Com.* 431. In the civil law that liability was confined to the perſon ſtanding in the relation of *paterfamilias* to the perſon doing the injury. *Inſt. lib.* 4. tit. 5. § 1. *Dig. lib.* 9. tit. 3. And though in our law it has been extended to caſes where the agent is not a mere domeſtic, yet the principle continues the ſame. Now clearly it was not in the power of this Defendant to control the agent by whom the injury to this Plaintiff was effected. He was not employed by the Defendant but by the lime-burner: nor was it in the Defendant's power to prevent him, or any one of the intermediate ſubcontracting parties, from executing the reſpective parts of that buſineſs which each had undertaken to perform. The Defendant's interference would have amounted to a breach of his own contract with the ſurveyor, by which the latter was empowered to employ ſuch perſons as he might think proper. So little connection was there between the Defendant and the various perſons employed in the work that he could have maintained no action againſt any one of them for having ill performed his part, but muſt have reſorted to the ſurveyor with whom his contract was made. With reſpect to *Stone* v. *Cartwright*, the owner of the mine was there ſaid to be anſwerable for the negligence of the perſons employed by the ſteward, but it is to be obſerved, that he was alſo anſwerable to them for their wages. In *Lane* v. *Sir Robert Cotton*, 12 *Mod.* 488, 9. *Holt* Ch. J. ſaid, that "the reaſon why a principal ſhall anſwer "for his deputy is, becauſe as he, as principal, has power to put "him in, ſo he has power to put him out without ſhewing any "cauſe." So in *Michael* v. *Aleſtree*, 2 *Lev.* 172. it was held that an action might be maintained againſt a maſter for damage done by his ſervant to the Plaintiff, in exerciſing his horſes in an improper place, though he was abſent, becauſe it ſhould be intended that the maſter ſent the ſervant to exerciſe the horſes there. But if a ſervant who is ordered to do a lawful act exceed his authority, and thereby commit an injury, the maſter is not liable. *Kingſton* v. *Booth*, *Skin.* 228. *Middleton* v. *Fowler*, 1 *Salk.* 282.

Eyre Ch. J. At the trial I entertained great doubts with reſpect to the Defendant's liability in this action. He appeared to be ſo far removed from the immediate author of the nuiſance, and ſo far removed even from the perſon connected with the immediate author in the relation of maſter, that to allow him to be charged for the injury ſuſtained by the Plaintiff ſeemed to render a circuity of action neceſſary. Upon the Plaintiff's recovery, the Defendant would be entitled to an action againſt the ſurveyor, the ſurveyor and each of the ſubcontracting parties in ſucceſſion to actions againſt the perſons with whom they immediately contracted, and laſt of all the lime-burner would be entitled to the common action againſt his own ſervant. I heſitated therefore in carrying the reſponſibility beyond the immediate maſter of the perſon who committed the injury, and I retained my doubts upon the ſubject, till I had heard the argument on the part of the Plaintiff, and had an opportunity of conferring with my Brothers. They, including Mr. Juſtice *Buller*, are ſatisfied that the action will lie, and upon reflection, I am diſpoſed to concur with them: though I am ready to confeſs that I find great difficulty in ſtating with accuracy the grounds on which it is to be ſupported. The relation between maſter and ſervant as commonly exemplified in actions brought againſt the maſter is not ſufficient: and the general propoſition, that a perſon ſhall be anſwerable for any injury which ariſes in carrying into execution that which he has employed another to do, ſeems to be too large and looſe. The principle of *Stone* v. *Cartwright*, with the deciſion of which I am well ſatisfied, is certainly applicable to this caſe: but that of *Littledale* v. *Lord Lonſdale* (*a*) comes much nearer. Lord *Lonſdale*'s colliery was worked in ſuch a manner by his agents and ſervants (or poſſibly by his contractors for that would have made no difference) that an injury was done to the Plaintiff's houſe, and his Lordſhip was held reſponſible. Why? Becauſe the injury was done in the courſe of *his* working the colliery: whether he worked it by agents, by ſervants, or by contractors, ſtill it was his work: and though another perſon might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the perſons employed muſt have been conſidered as his agents and ſervants notwithſtanding any ſuch arrangement; and he muſt have been reſponſible to all the world, on the principle of *ſic utere tuo ut alienum non lædas*. Lord *Lonſdale* having empowered the contractor to appoint ſuch perſons under him as he ſhould think fit, the perſons appointed would in contemplation of law have been the agents and ſervants of Lord *Lonſdale*. Nor can I think that it would have made any difference, if the injury complained of had ariſen from his Lordſhip's coals having been placed by the workmen, on the premiſes of Mr. *Littledale*, ſince it would have been impoſſible to diſtinguiſh ſuch an act from the general courſe of buſineſs in which they were engaged, the whole of which buſineſs was carried on either by the expreſs direction of Lord *Lonſdale*, or under a preſumed authority from him. The principle of this caſe therefore, ſeems to afford a ground which may be ſatisfactory for the preſent action, though I do not ſay that it is exactly in point. According to the doctrine cited from *Blackſtone's Commentaries* if one of a family "layeth or caſteth" any thing out of the houſe which conſtitutes a nuiſance the owner is chargeable. Suppoſe then that the owner of a houſe, with a view to rebuild or repair, employ his own ſervants to erect a hord in the ſtreet (which being for the benefit of the public they may lawfully do) and they carry it out ſo far as to encroach

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(*a*) 2 *H. Bl.* 267. 299. The facts of that caſe are to be collected from the pleadings.

unreaſonably on the highway, it is clear that the owner would be guilty of a nuiſance: and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a perſon to do it for a certain ſum of money, inſtead of employing his own ſervants for the purpoſe; for in contemplation of law the erection of the hord would equally be his act. If that be eſtabliſhed we come one ſtep nearer to this caſe. Here the Defendant by a contractor, and by agents under him, was repairing his houſe: the repairs were done at his expence, and the repairing was his act. If then the injury complained of by the Plaintiff was committed in the courſe of making thoſe repairs, I am unable to diſtinguiſh the caſe from that of erecting the hord, or from *Littledale* v. *Lord Lonſdale*, unleſs indeed a diſtinction could be maintained (which however I do not think poſſible) on the ground of the lime not having been delivered *on* the Defendant's premiſes, but only at a place cloſe to them, with a view to being carried on to the premiſes and conſumed there. My Brother *Buller* recollects a caſe which he would have ſtated more particularly, had he been able to attend. It was this: a maſter having employed his ſervant to do ſome act, the ſervant out of idleneſs employed another to do it, and that perſon in carrying into execution the orders which had been given to the ſervant committed an injury to the Plaintiff, for which the maſter was held liable. The reſponſibility was thrown on the principal from whom the authority originally moved. This determination is certainty highly convenient, and beneficial to the public. Where a civil injury of the kind now complained of has been ſuſtained the remedy ought to be obvious, and the perſon injured ſhould have only to diſcover the owner of the houſe which was the occaſion of the miſchief; not be compelled to enter into the concerns between that owner and other perſons, the inconvenience of which would be more heavily felt than any which can ariſe from a circuity of action. Upon the whole caſe therefore, though I ſtill feel difficulty in ſtating the preciſe principle on which the action is founded, I am ſatisfied with the opinion of my Brothers.

HEATH J. I found my opinion on this ſingle point, *viz.* That all the ſubcontracting parties were in the employ of the Defendant. It has been ſtrongly argued that the Defendant is not liable, becauſe his liability can be founded in nothing but the mere relation of maſter and ſervant; but no authority has been cited to ſupport that propoſition. Whatever may be the doctine of the civil law, it is perfectly clear that our law carries ſuch liability much further. Thus a factor is not a ſervant: but being employed and truſted by the merchant, the latter according to the caſe in *Salkeld* is reſponſible for his acts. There are beſides this other caſes. As where a perſon hires a coach upon a job, and a job-coachman is ſent with it, the perſon who hires the coach is liable for any miſchief done by the coachman while in his employ, though he is not his ſervant. We all remember an action for defamation brought againſt *Tatterſall* who was the proprietor of a newſpaper, with ſixteen others: the libel was inſerted by the perſons whom the proprietors had employed by contract to collect news, and compoſe the paper, yet the Defendant was held liable. Now this is a ſtrong caſe to ſhew that it makes no difference whether the perſons employed by the Defendant, were employed on a *quantum meruit*, or were to be paid a ſtipulated ſum. In *Roſewell* v. *Prior*, *Salk.* 460. an action for the continuance of a nuiſance was held to lie againſt the Defendant though he had underlet the building which was the ſubject of it, and though the Plaintiff had recovered againſt him in a former action for the erection of the nuiſance; for the Court ſaid "He affirmed the continuance by his demiſe, and received rent as a conſideration for it." That caſe is analogous to the preſent; the ground of the deciſion having been, that the Defendant was benefited by the nuiſance complained of. It is not poſſible to conceive a caſe in which more miſchief might ariſe than in the preſent, if the various ſubcontracts ſhould be held ſufficient to defeat the Plaintiff of his action. Probably he would not be able to trace them all, ſince none of the parties could give him any information, and conſequently he might be turned round every time he came to trial.

ROOKE J. I am of the ſame opinion. He who has work going on for his benefit, and on his own premiſes muſt be civilly anſwerable for the acts of thoſe whom he employs. According to the principle of the caſe in 2 *Lev.* it ſhall be intended by the Court, that he has a control over all thoſe perſons who work on his premiſes, and he ſhall not be allowed to diſcharge himſelf from that intendment of law by any act or contract of his own. He ought to reſerve ſuch control, and if he deprive himſelf of it, the law will not permit him to take advantage of that circumſtance in order to ſkreen himſelf from an action. The caſe which has been ſuppoſed of the lime having been depoſited at a diſtance from the

Defendant's houſe, and the accident having happened there does not apply: for here a perſon acting under the general employment of the Defendaant brought a quantity of lime to the premiſes, and depoſited it without any objection being made by any perſon there, whereas it was the duty of the Defendant to have provided a perſon to ſuperintend thoſe employed in his work. The perſon from whom the whole authority is originally derived, is the perſon who ought to be anſwerable, and great inconvenience would follow if it were otherwiſe. There is ſuch a variety of ſubcontracts in this caſe, as rarely occurs, but this ſerves only to illuſtrate more ſtrongly the miſchief which would enſue ſhould we depart from the doctrine in *Stone* v. *Cartwright*. In that caſe, and in *Littledale* v. *Lord Lonſdale*, the ſafeſt rule was adopted. The Plaintiff may bring his action either againſt the perſon from whom the authority flows, and for whoſe benefit the work is carried on, or againſt the perſon by whom the injury was actually committed. If the employer ſuffer by the acts of thoſe with whom he has contracted he muſt ſeek his remedy againſt them.

Rule diſcharged.

April 27th.

Gwillim *v.* Thomas Holbrook.

The condition of a replevin bond is not ſatisfied by a proſecution of the ſuit in the county court, but the plaint if removed by *re. fa. lo.* into a ſuperior court muſt be proſecuted *there* with effect, and a return made if adjudged *there*.

Debt on a replevin bond by the aſſignee of the ſheriff of *Middleſex*. The declaration ſtated the Plaintiff's having diſtrained as bailiff of the mayor and commonality and citizens of the city of *London* governors of the houſe of the poor commonly called *Saint Bartholomew's Hoſpital* near *Weſt-Smithfield London* of the foundation of King *Henry* the Eighth, and proceeding in the uſual way, ſet out the bond and condition which was that *R. Holbrook* ſhould "appear at the next county court for the county of "*Middleſex* to be holden at &c. and then and there proſecute his "action with effect againſt the Plaintiff for taking and unjuſtly de"taining his cattle &c. and make return thereof if return thereof "ſhould be adjudged by law"; it then averred, that a plaint was duly levied at the next county court by *R. Holbrook*, and removed into this court by *recordari facias loquelam*; that *R. Holbrook* made default and Judgment was given for a return; that the bond was thereby forfeited and was in conſequence duly aſſigned &c.

Plea. *Actionem non*, "becauſe he ſays, that the ſaid *R. Holbrook* did appear at the county court for the ſaid county of *Middleſex*

dleſex holden next after the making of the ſaid writing obligatory as in the ſaid declaration is mentioned, and did then and there proſecute his action with effect againſt the Plaintiff for taking and unjuſtly detaining his ſaid cattle goods and chattels, and continued to proſecute the ſame with effect until the record of the ſaid plaint in the ſaid declaration mentioned was duly had and removed into the ſaid court of our ſaid lord the King of the bench aforeſaid by virtue of the ſaid writ of our ſaid lord the King of *recordari facias loquelam* in the ſaid declaration alſo mentioned to wit at &c. And this &c. Wherefore &c.

General demurrer, and joinder.

Le Blanc Serjt. in ſupport of the demurrer, contended that by the condition of the bond *R. Holbrook* was not merely bound to proſecute his ſuit with effect in the county court, but to follow it into the court above, and, to make a return, wherever ſuch return ſhould be legally adjudged; he cited *Anon. Forteſ.* 209. *Nichols* v. *Newman*, *Forteſ.* 361. and *Vaughan* v. *Norris*, *Caſ. temp. Hardw.* 137.

Shepherd Serjt. who was to have argued on the other ſide, admitted that the preſent caſe could not be diſtinguiſhed from thoſe cited;

And *the Court* were of the ſame opinion.

Judgment for the Plaintiff (*a*).

(*a*) Vid. etiam *Chapman et al'* v. *Butcher*, *Carth.* 248. *Lane* v. *Foulk*, *Comb.* 228.

Tippet and Others *v.* May and Two Others.

April 30th.

Aſſumpſit againſt three: two pleaded a debt of record by way of ſet-off: the Plaintiff replied *nul tiel record* and gave a day to the two Defendants, but entered no ſuggeſtion reſpecting the third; held on demurrer that the action being diſcontinued, judgment muſt be given againſt the Plaintiff, even though the Defendants' plea were bad.

Declaration in *aſſumpſit* againſt three. Two of the Defendants pleaded a debt of record by way of ſet-off, without taking any notice of the third. The Plaintiffs replied *nul tiel record*, and gave a day to produce the record to the two Defendants who pleaded, but entered no ſuggeſtion on the roll reſpecting the third.

To this there was a general demurrer, and joinder.

Marſhall Serjt. in ſupport of the demurrer. The ground of this demurrer is, that as two of the three Defendants have pleaded, and the Plaintiffs have given them a day to produce the record, without ſuggeſting any thing with reſpect to the third, the action is diſcontinued as to him, and that a diſcontinuance as to one

Defendant is a diſcontinuance as to all. It is a ſettled rule of law that a ſuit muſt be continued from its commencement to its concluſion without any chaſm; and that any chaſm is a diſcontinuance. In *Gilb. Hiſt. C. P.* 155. 158. it is ſaid that if a Defendant pleads to part and ſays nothing to the other part, and the Plaintiff replies to ſuch plea without taking judgment for the part not anſwered to, it is a diſcontinuance, becauſe he does not follow his entire demand in the court. So if he demur generally, for he ought to have prayed judgment upon *nil dicit* for that part. 1 *Rol. Abr. fo.* 487, 488. And this rule applies not only to the ſubject-matter of the cauſe, but alſo to the parties. 1 *Rol. Abr. fo.* 488. *Com. Dig. Pleader* (W. 3). Thus in *Bro. Abr. Diſcontinuance de Proceſs, pl.* 22. Replevin againſt three, avowry by one, and ſo to iſſue, and the two others ſaid they came in aid of the avowant, yet if the two have not a day given and continuance on the roll from day to day, all is diſcontinued: and *pl.* 8. Replevin againſt three of a taking in *S.* one appeared and avowed for himſelf in *B.* and traverſed the taking in *S.* and made avowry to have a return which paſſed for the Plaintiff, and he prayed judgment, and it was determined that as no proceeding was againſt the other two, all was diſcontinued, for the proceeding ſhall be made to continue againſt thoſe who make default, otherwiſe it is a diſcontinuance. *Green* v. *Charnock and another*, *Cro. Eliz.* 762. is to the ſame effect. The rule holds alſo where a Plaintiff makes default. *Paſton* v. *Luſher*, *Yelv.* 155. If it be contended on the other ſide that a plea of ſet-off by two Defendants in an action againſt three is bad, ſtill the Plaintiffs will not be entitled to judgment on this record for by the diſcontinuance the cauſe is out of court.

Shepherd Serjt. *contrà*. Though the queſtion immediately in iſſue on this demurrer be, whether the replication which the Plaintiffs have put in be ſufficient in law to anſwer the Defendant's plea, ſtill if we can ſhew that the plea itſelf is bad, they cannot have judgment. Indeed if we were to amend our replication the Defendants would be under the ſame difficulty. No authority has been adduced to ſhew that diſcontinuance is the ſubject of demurrer (*a*).

EYRE

(*a*) See *Weeks* v. *Peach*, 1 *Salk.* 179. and *Market* v. *Johnſon*, 1 *Salk.* 180. in the former of which caſes Lord Ch. J. *Holt* ſaid "if a plea begin only as an anſwer to "part, and is in truth but an anſwer to "part, it is a diſcontinuance and the Plaintiff muſt not demur but take his judgment "for that as by *nil dicit*; for if he demurs "or pleads over the whole action is diſcontinued." However, the doctrine in *Croſs* v. *Bilſon*, 1 *Salk.* 3. *reſ.* 2. ſeems ſcarcely reconcileable with thoſe caſes: there the Defendant

EYRE Ch. J. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the firſt fault he has a right to take advantage of it on demurrer. But he cannot aſk the judgment of the Court unleſs he appear on the record to be capable of demanding judgment (*a*). Now in this caſe the Plaintiffs, having replied to a plea by two of the Defendants without taking notice of the third againſt whom they declared, have made a diſcontinuance; the cauſe therefore being diſcontinued, judgment muſt be given againſt the Plaintiffs, for they are not in a ſituation to take advantage of the badneſs of the Defendants' plea.

ROOKE J. The Plaintiffs not being in court, cannot call upon the Court to give them judgment.

Per Curiam,

Leave given to amend on payment of coſts (*b*).

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fendant having diſcontinued by concluding his demurrer to the Plaintiff's replication with a prayer *quod narratio prædicta caſſetur*, it was held that the Plaintiff had his election to take judgment, or to join in demurrer, and that having done the latter, the Court might give him judgment upon the whole record.

(*a*) So "When Plaintiff makes replication, ſur-rejoinder &c. and thereby it appeareth that upon the whole matter, and "record, the Plaintiff hath no cauſe of "action, he ſhall never have judgment, although that the bar or rejoinder be in-"ſufficient in matter; for the Court ought to "judge upon the whole record." Doctor *Bonham*'s caſe, 8 *Co.* 120. *b.* See alſo in confirmation of this, *Rigeway*'s caſe, 3 *Co.* 52. *b.* and *Turnor*'s caſe, 8 *Co.* 133. *b.*

(*b*) Had the demurrer been of the ſame term with the record, it ſeems the Plaintiff would have been entitled *de jure* to enter a ſuggeſtion after demurrer joined. Thus in *Woodward* v. *Robinſon*, 1 *Str.* 302. where the Defendant having pleaded a bad plea to the 1ſt count, and in his 2d plea pleaded to part only of the other counts, the Plaintiff in his replication merely tendered iſſue, and the Defendant demurred; the Court held that though there was a diſcontinuance, yet the pleading being of the ſame term, the Plaintiff might ſtill take judgment by *nihil dicit* for ſo much as was uncovered by the plea. Accordingly the caſe was adjourned, and the Plaintiff having ſet the matter right, had judgment on the demurrer. To the ſame effect is *Vincent* v. *Beſton*, 1 *Ld. Raym.* 716. But it is to be obſerved, that in thoſe caſes the Plaintiffs were not allowed to have judgment until the diſcontinuances were done away, although the Defendants had committed the firſt fault upon the record. *Vid. etiam Middleton* v. *Cheſeman*, *Telv.* 65.

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April 30th.

To debt for an eſcape Defendant pleaded a negligent eſcape and voluntary return ſince which the priſoner had been ſafely kept. Plaintiff in his replication admitted the negligent eſcape and voluntary return, but alleged that the priſoner had not been ſafely kept ſince that time, having again eſcaped, which was a different eſcape from that mentioned in the plea, and the ſame for which the action was brought. Defendant in his rejoinder traverſed the allegation that the priſoner had not been ſafely kept, and then pleaded to the latter part of the replication as to a new aſſignment, a negligent eſcape, voluntary return, and ſafe keeping ſince, in the ſame manner as in the plea. This latter part of the rejoinder the Court refuſed to ſtrike out on motion, but held it bad on ſpecial demurrer.

A plea that, if the priſoner eſcaped ſeveral times (without ſpecifying them), he returned as often, is bad.

THIS was an action of debt for an eſcape out of execution, againſt the Defendant as warden of the *Fleet*. Pleas. 1ſt,

Nil

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Nil debet. 2nd, That the eſcape was without the knowledge privity conſent or permiſſion of the Defendant, and againſt his will, and that before he knew of the eſcape, and before the filing of the bill the priſoner voluntarily and of his own accord returned back into the cuſtody of the Defendant, and continually from thenceforth hitherto hath been and ſtill is there kept and detained in execution at the ſuit of the ſaid Plaintiff. This was accompanied by an affidavit on the part of the Defendant according to the proviſions of 8 & 9 *Will.* 3. *c.* 27. *ſ.* 6. that the eſcape was without his privity. The Plaintiff in his replication, 1ſt, joined iſſue on *nil debet*; 2dly, admitting that the eſcape was without the privity of the Defendant and that the return to priſon was voluntary, went on to allege that the priſoner had not from thenceforth been kept and detained in the cuſtody of the Defendant, but that after he had ſo returned into cuſtody and after the Defendant had notice of the former eſcape, and before the exhibiting the bill, the Defendant permitted and ſuffered the priſoner to eſcape and go at large in manner as the Plaintiff had complained againſt him, " which ſaid laſt-mentioned eſcape is another and " different eſcape than the eſcape mentioned in the plea of the " Defendant ſo by him laſtly above pleaded in bar as aforeſaid, " and was and is the very ſame identical eſcape for which the " ſaid Plaintiff brought this action and exhibited his aforeſaid bill, " and this," &c.

The Defendant in his rejoinder having traverſed the allegation that the priſoner had not been ſafely kept ſince his voluntary return, with a verification in the uſual way, proceeded: " And as to " the ſaid ſuppoſed eſcape ſo by the ſaid Plaintiff newly aſſigned " *actionem non*, becauſe if any ſuch eſcape ſo newly aſſigned was " made by the ſaid priſoner the ſame was ſo made by the ſaid " priſoner privately and without the knowledge privity conſent " or permiſſion of the Defendant and againſt his will, and that " afterwards and before the Defendant knew of ſuch eſcape and " before the filing the bill of him the ſaid Plaintiff againſt the " ſaid Defendant in this behalf, to wit, on &c. at &c., the ſaid " priſoner voluntarily and of his own accord returned back again " into the cuſtody of the ſaid Defendant, and continually from " thenceforth hitherto hath been and ſtill is kept and detained in " the cuſtody of the ſaid Defendant in execution at the ſuit of " the ſaid Plaintiff for the debt and damages aforeſaid in form " aforeſaid recovered by the ſaid Plaintiff; which ſaid eſcape in " this plea mentioned, if any ſuch was made, is the ſame eſcape

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" whereof the ſaid Plaintiff hath above in his ſaid *new aſſignment* " in this behalf alleged againſt him the ſaid Defendant. And " this, &c., wherefore he prays judgment if the ſaid Plaintiff " ought to have or maintain his aforeſaid action in reſpect of " the premiſes ſo newly aſſigned againſt him," &c.

Le Blanc Serjt. in the laſt term moved to ſtrike out the latter part of the rejoinder, contending that the Defendant had pleaded two rejoinders, which he could not do even with the leave of the Court, much leſs without it: and that it was like the caſe of a Defendant pleading two pleas without the leave of the Court, where the Plaintiff may apply to the Court to ſtrike out one of them (*a*).

Shepherd Serjt. oppoſed the application in the firſt inſtance, and urged that as the replication was in the nature of a new aſſignment, the Defendant was obliged to put in this ſort of rejoinder in order to meet the allegation of a voluntary eſcape in the latter part of the replication.

EYRE Ch. J. There is a difference between this caſe, and that of two pleas pleaded without leave of the Court: the two pleas are diſtinct from each other; this is but one rejoinder containing double matter; it may be a ſubject for demurrer, but not for the exerciſe of the ſummary juriſdiction of the Court.

In conſequence of this intimation from the Court a ſpecial demurrer was afterwards put in, aſſigning for cauſes, " that the " ſaid rejoinder is double and multifarious in this, that it contains " two ſeparate and diſtinct anſwers, and offers two ſeparate " and diſtinct iſſues upon the aforeſaid replication of the " Plaintiff to the ſaid plea of the Defendant, ſo by him laſtly " above pleaded in bar, whereas only one iſſue could or ought " to have been offered or taken upon the ſaid replication or " upon the matter therein contained, and that the ſaid rejoinder is alſo double and informal in this, that it offers to " put in iſſue two diſtinct and different eſcapes, whereas the " Plaintiff hath originally declared upon and in his ſubſequent " replication hath ſupported his ſaid declaration by only one " eſcape, and that according to the rules of good pleading the " ſaid rejoinder ſhould and ought to have been confined to and

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(*a*) It has been ſaid that in ſuch caſe the double plea is a nullity, and the Plaintiff may ſign judgment, *per Buller* J. *Bedford* v. *Gatfield, H.* 26 *Geo.* 3. *K. B. Tidd's Pr.* 388.—1 *Sellon's Pr.* 296.

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“ have concluded with a traverſe, which is thereby taken on the
“ ſaid eſcape ſo ſet forth in the ſaid replication of the ſaid Plain-
“ tiff, yet the ſaid Defendant hath very unneceſſarily and inarti-
“ ficially extended the ſaid rejoinder to further and other and
“ different matter by way of ſuppoſed ſecond anſwer to the ſaid
“ replication, whereas only one anſwer could or ought to have
“ been made to and only one iſſue offered or taken upon the ſaid
“ replication or in or by the ſaid rejoinder; and that the matter
“ ſo ſecondly alleged in the ſaid rejoinder is no anſwer to the
“ ſaid replication, nor direct or poſitive denial of the eſcape therein
“ mentioned, but only an argumentative denial of ſuch eſcape,
“ whereas the ſaid eſcape ſhould have been expreſsly and directly
“ traverſed and denied by the ſaid rejoinder; and that the ſaid
“ rejoinder is calculated to occaſion the trial of two ſeparate iſſues
“ upon one and the ſame fact, and alſo to introduce a vexatious
“ and unneceſſary length of pleading in this cauſe; and that the
“ ſaid rejoinder is repugnant and informal in this, that although
“ in one part thereof it conſiders the ſaid replication and anſwers
“ the ſame as being a replication, yet in another part thereof it
“ conſiders the ſaid replication as being a new aſſignment, and
“ profeſſes to anſwer the ſame accordingly, and that the ſaid re-
“ joinder is in various other reſpects repugnant, multifarious,
“ inſufficient and informal.”

Joinder in demurrer.

Le Blanc in ſupport of the demurrer now contended, that if this rejoinder ſhould be allowed the pleadings might go on *in infinitum*, for if the Plaintiff were to ſur-rejoin in the ſame manner as he had replied, the Defendant might rebut in the ſame manner as he had rejoined, and ſo a new iſſue would be created at every ſtage of the pleadings; and that it was a clear rule in pleading that iſſues could not be multiplied after the plea.

Shepherd Serjt. *contrà*, again inſiſted that as the Defendant could not give in evidence a negligent eſcape and voluntary return in anſwer to the allegation of a voluntary eſcape in the latter part of the replication without putting it on the record, the Defendant might be deprived of a fair defence, unleſs the rejoinder were allowed; and urged that the form of the rejoinder was the conſequence of the unuſual and ingenious way of pleading adopted in the Plaintiff's replication.

EYRE Ch. J. If the obſervation be well-founded, that the common forms of replication in theſe caſes ſtop at the allegation, that the warden has not kept the priſoner in cuſtody ſince the firſt voluntary return, the conſequence is, that this replication is not merely ingenious but informal, and my doubt has been, whether the firſt fault was not committed by the Plaintiff. But in truth it ſeems to me that the latter part of the replication is nothing more than an amplification of the denial that the Defendant had kept the priſoner in ſafe cuſtody; it amounts to this, that he had not kept him in ſafe cuſtody, for he had permitted him to eſcape afterwards. It does not appear to me that this rejoinder will enable the Defendant to give in evidence any ſecond voluntary return. The Defendant by his plea excuſes an eſcape, upon the ground of the priſoner having voluntarily returned and remained in his cuſtody ever ſince. Now put the caſe that the priſoner had made two or three eſcapes, and had returned as many times, the Defendant was bound to ſtate them all in his plea, in order to eſtabliſh the averment that the priſoner had been kept in ſafe cuſtody ever ſince. If this be not the caſe, the pleadings may go on for ever. The Defendant therefore has made the real fault, as there is nothing in the replication in the nature of a new aſſignment. Perhaps had the Plaintiff merely traverſed the allegation in the Defendant's plea, it would have been ſufficient and the ſhorteſt way, though I do not think him wrong for putting in a more explicit contradiction.

The Court however gave the Defendant leave to amend on payment of coſts, intimating at the ſame time that it muſt be done in ſuch a way as not to preclude the queſtion being brought to iſſue as ſoon as poſſible.

Accordingly the Defendant amended his ſecond plea by inſerting an allegation "that *if the ſaid priſoner did at any time or times* "after the ſaid commitment &c. go at large from and out of "the ſaid priſon of the *Fleet* and from and out of the cuſtody of "him the ſaid Defendant, he the ſaid priſoner ſo eſcaped and went "at large privately and without the knowledge &c. of him the "Defendant and againſt his will; and *that if any ſuch eſcape* "*or eſcapes was or were ſo made the ſaid priſoner after ſuch* "*eſcape or eſcapes and before the Defendant knew of ſuch eſcape* "*or eſcapes and before the filing of the bill voluntarily and of his* "*own accord returned back again into the cuſtody of the Defendant* and continually from thenceforth until and at the time of the "commencement of the ſuit was and hath been and ſtill is kept "and detained" &c.

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GRIFFITHS *v.* EYLES.

Upon this *Le Blanc* again applied to the Court and contended, that this plea by no means complied with their injunction, and was ſo framed as to afford no probability of any iſſue.

EYRE Ch. J. The Defendant knows and is bound to know the ſtate of his priſon, and whether there has been an involuntary eſcape and a ſubſequent return and ſafe keeping of the priſoner ſince that time, or whether there has been no eſcape at all. If there has been one eſcape and one return, or if there have been ten eſcapes and ten returns, and the Defendant thinks fit to plead them, and to inſiſt, that independent of ſuch eſcapes the priſoner has been kept in ſafe cuſtody, he is at liberty to do ſo. But he cannot plead hypothetically that if there has been any eſcape there has alſo been a return. He muſt either ſtand upon an averment that there has been no eſcape or that there have been one, two, or ten eſcapes, after which the priſoner returned, and that having kept him in cuſtody ſince that time he is entitled to give that anſwer to the Plaintiff's charge. The Defendant muſt take upon himſelf to ſtate the eſcapes ſpecifically, that the Plaintiff may have an opportunity of combating his aſſertion. With reſpect to the Plaintiff's replication it never abandoned the eſcape laid in the declaration. To that eſcape the Defendant pleaded what was an anſwer as far as it went; in reply to which the Plaintiff admitted the fact of the Defendant's plea, but added, that he did not complain of the eſcape previous to the return, but that the Defendant had not kept the priſoner in cuſtody ſince that return.

The Court again gave the Defendant leave to amend, by ſtriking out the latter part of the rejoinder which had been demurred to, and leaving the traverſe of the allegation, that after the return of the priſoner, and after notice of the former eſcape, the Defendant voluntarily permitted the priſoner to eſcape (*a*).

(*a*) The Defendant having amended accordingly, iſſue was joined on the traverſe, and the cauſe came on to be tried before *Eyre* Ch. J. at the Guildhall ſittings after this term. At the trial the Plaintiff proved a notice of an eſcape to the Defendant, and an eſcape ſubſequent to that notice, but did not prove any eſcape previous to the notice. Upon this the Lord Chief Juſtice nonſuited him, holding, that the firſt eſcape muſt ſtill remain the *giſt* of the action, and would be purged or not, as it ſhould turn out that the priſoner had or had not been ſafely kept ſince his voluntary return after that eſcape.

PEEL and Others *v.* TATLOCK.

April 30th.

If *A.* become bound to *B.* for the honeſty of *C.* who embezzles money, *B.* may maintain an action on the guaranty, though three years have elapſed without any notice having been given of the embezzlement by *B.* to *A.*; at leaſt if *A.* was acquainted with the circumſtance from any other quarter, and *B.* does not appear to have concealed it from him induſtriouſly. *A.* will not be diſcharged from his guaranty though *B.* appear to have given credit to *C.* for the amount of the ſum embezzled.

THIS action was brought to recover 100*l.* the amount of the Defendant's ſubſcription to a guaranty of 600*l.* for the true and faithful diſcharge of the truſt which the Plaintiffs might repoſe in one *Abſalom Goodrich*, acting as caſhier or ſuperintending clerk in their banking-houſe.

The cauſe was tried at the Guildhall ſittings after laſt *Michaelmas* term, before *Heath* J. and a Special Jury, when the following facts appeared in evidence. The guaranty was ſigned on the 5th of *October* 1790: *Goodrich* continued in the Plaintiffs' ſervice till *March* 1793, at which time he abſconded having embezzled money of the Plaintiffs' to the amount of 1292*l.* 8*s.* 6*d.* In *April* following a correſpondence commenced between *Goodrich* and the Plaintiffs, in which the former, after ſtating that he had embezzled four bills, went on thus; "I ſhould conceive it may not be unreaſonable to propoſe that the gentlemen ſhould make a conſideration of about 300*l.* for the extra exertions I have uſed for the intereſt of the houſe, and the extra expences I have been at by having no regular home in town: perhaps there may be due to me on my own account about 100*l.* though of this I am not quite certain. If theſe propoſals could be admitted, I ſhould then ſtand a debtor to the houſe about 890*l.* My property at home may have coſt me about 150*l.* which I freely offer." He then ſuggeſted a plan (*a*) for balancing the books of the houſe, by which the Plaintiffs might keep his miſconduct ſecret from the other clerks, and having intimated an intention of retiring into the country and eſtabliſhing a ſchool, concluded thus, "Whatever I can obtain by labour and induſtry above the common neceſſaries for exiſtence ſhall be faithfully appropriated to repay the debt once a month or once a quarter into the hands of ſome perſon for your uſe." In anſwer to the above the Plaintiffs wrote a letter dated the 22d *June* 1793, containing the following expreſſions; "We have no objection to your adopting your propoſed plan of tuition, and you may reſt free of apprehenſion from being diſturbed in a laudable purſuit for ſupport of yourſelf and

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(*a*) This was to be done by entering the deficiency as a loan to him in the private ledger of the partners, and carrying it into the books to which the clerks had acceſs, under the head of private loan, marked with a particular letter.

" family, taking it for granted that your repreſentations to us will " be found ſtrictly true. Indeed by ſuch endeavours it is poſſible " that you in future may be in a ſituation to make ſome recompence " for paſt misfortunes, and reſpecting which in every converſa- " tion which we have been obliged to enter into we have uni- " formly expreſſed ourſelves with great tenderneſs towards you. " If we had no other motives for that, ſelf-policy would dictate " ſuch conduct." The plan ſuggeſted by *Goodrich* for concealing his miſconduct from the clerks was adopted by the Plaintiffs. In the Summer of 1795 *James Tatlock* offered *Goodrich*, who was then out of employ, to procure him a place provided the Plaintiffs would give him a character: upon which *Goodrich* made an application to the Plaintiffs for that purpoſe, and on the 15th *September* 1795 wrote them a letter in which were the following expreſſions: " I have juſt waited on Mr. *Tatlock*, and mentioned " in general what you remarked on my requeſt, his reply was, he " would call on you himſelf this day; it would have pleaſed me " better had that not been the caſe; but as I could not with any " propriety forbid him, I muſt take the conſequences. However " as I believe Mr. *Tatlock* knows no more of my concerns in your " houſe than what I have told him myſelf reſpecting *Riley*, " *Barber* &c.'s (*a*) loſſes, you will have it in your power to ſpeak " in general terms reſpecting your being conſiderable loſers by my " imprudence, and this done with tenderneſs on your part may " induce him to be my friend. In regard to the bond, ſhould he " mention it, and you think proper, perhaps making him the " offer of his name may be in my favour." No evidence was given of actual notice by the Plaintiffs to the Defendant or to any of the other ſubſcribers to the guaranty of *Goodrich*'s miſconduct, and the loſs they ſuſtained thereby, till *July* 1796, when actions were commenced againſt the Defendant, and againſt his brother *James Tatlock* and one *S. Potter* who were alſo ſubſcribers; theſe were all conſolidated. The learned Judge left it to the jury to ſay whether the Plaintiffs had waved the guaranty and exonerated the Defendant by making the whole of *Goodrich*'s embezzlement a debt from him? The jury found a verdict for the Plaintiff.

Le Blanc and *Shepherd* Serjts. on a former day ſhewed cauſe againſt a rule *niſi* for a new trial, and contended, that the guaranty was not waved by any thing which paſſed between *Goodrich* and the Plaintiffs,

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(*a*) Theſe were tranſactions which did not come within the ſcope of the preſent caſe.

Plaintiffs, or by the length of time which had elapſed before notice was given to the Defendant; that with reſpect to the concealment it might have been dangerous for the houſe to have made public the miſconduct of their clerk and their loſs in conſequence; that by the terms of the guaranty the Defendant was abſolutely bound to anſwer for the deficiencies in *Goodrich*'s accounts, and that the effect of the length of time which had elapſed was a queſtion for the jury who had decided that it was not a waver. They urged that the Defendant had not been injured by the delay, as *Goodrich* continued inſolvent from the time that he committed the fraud to that of his death, which was juſt before the trial.

Cockell and *Heywood* Serjts. *contrà*, inſiſted that the Plaintiffs had accepted *Goodrich* for their debtor, by giving him credit to the amount of the deficiency, and entering it in their books as a loan; that the danger the Plaintiffs might have incurred by making public the embezzlement in queſtion, could not deprive the Defendant of his right to notice, as in the caſe of a bill of exchange, where notice of the drawer's default muſt be given on the earlieſt opportunity leaſt his ſituation ſhould be altered, and that the ſame rule held in caſes of bankruptcy, and ought to be obſerved in all other mercantile tranſactions; and that the time within which notice ſhould have been given was a queſtion of law.

Eyre Ch. J. This caſe ſeems to involve many points of law deſerving ſerious conſideration. The 1ſt queſtion is, whether a perſon who enters into a guaranty for the faithful diſcharge of duty by another be liable to anſwer for embezzlement of money by him at any indefinite period, or whether notice of ſuch embezzlement ought not to be given within reaſonable time? A 2nd queſtion will be, whether the intentional concealment of ſuch embezzlement will not diſcharge the guarantee from his liability? And a 3rd, whether that degree of credit has not been given to the party originally guilty, which may be ſufficient to change the character of the tranſaction, and by aſſent of the Plaintiff to convert *Goodrich*'s delinquency into a debt. And if ſo, whether the guarantee be anſwerable on the foundation of the original embezzlement? Theſe are queſtions of real importance to the mercantile world, and I wiſh to have them deliberately conſidered, not being prepared to give an opinion.

Buller J. Some things have been advanced in argument to which I do not agree. It has been ſaid that the rights of parties have been altered. If any new debt had been incurred, or if the demand

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demand had been enlarged, that might have been a fraud on the guarantee. But that is not the caſe here. The Defendant was liable to make ſatisfaction for the embezzlement of *Goodrich* to the amount of his ſubſcription, and if the Plaintiffs endeavoured to obtain any thing from *Goodrich* before they called on the Defendant, that was only in aid of the Defendant and tended to relieve him. Unleſs ſomething had taken place between the Plaintiffs and the guarantee, I do not ſee how the reſponſibility of the latter could be given up, ſince no favour ſhewn by the former to *Goodrich*, nor any thing done between them which did not create an injury to the Defendant, could diſcharge the guaranty.

Heath J. This caſe differs from that of a bill of exchange inaſmuch as the Defendant was not merely bound to pay the money in caſe *Goodrich* ſhould not pay it, but was bound abſolutely to pay for his deficiency.

Cur. adv. vult.

Eyre Ch. J. On this day (*abſentibus Buller & Heath* Js.) referred to the letter of the 11th of *September*, and ſaid; I am much inclined to think that a reaſonable inference may be drawn from this letter, which will go a great way towards laying out of the caſe the queſtion how far thoſe to whom a guaranty has been given may, by concealing the failure of the party for whom the guarantee is anſwerable, and giving him credit for the amount of the failure, be conſidered as having taken upon themſelves the whole loſs. I dare ſay the jury were ſatisfied that the Defendant was not kept in ignorance of the tranſaction. He did not put his caſe upon that ground; but the ground he has taken is, that the Plaintiffs had done enough to diſcharge the guarantee; upon this I at firſt heſitated, but am now diſpoſed to agree with my Brothers that it is not ſufficiently made out: this caſe therefore may ſtand without breaking in upon the rules of law.

Rooke J. The points formerly ſtated by my Lord were all left to the jury, and I have no reaſon to think that they decided wrong.

Rule diſcharged.

May 6th. *Cockell* now ſtated to the Court that the letter alluded to by the Lord Chief Juſtice on a former day, did not relate to the preſent Defendant but to his brother, and certainly could not affect *S. Potter*, the other guarantee. He urged that even if a communication between the Defendant and his brother could be preſumed, yet that ſuch preſumption could not be extended to *S. Potter*;

and truſted therefore, that if the Court ſhould ſtill think this rule ought to be diſcharged, they would open the conſolidation rule, in order to enable *S. Potter* to defend the action.

Eyre Ch. J. The principal difficulty I felt in the caſe aroſe on the ground of a ſuppoſed induſtrious concealment by the Plaintiff not only from the ſervants of the houſe, but from all the world, which on general principles of law might have had an effect on the liability of the guarantee. But looking through the caſe again, I think there is room to collect that there was no want of communication with the Defendant. The names of *Tatlock* and *Goodrich* are names not unknown at *Guildhall*, or in *Weſtminſter-hall*: whether the letter related to the Defendant or his brother, there is a plain alluſion to the guaranty in it. Conſidering either the probable iſſue of another trial, or the value of the intereſt, this is not a caſe in which the Court ought to open the conſolidation rule. To prevent miſtakes, I add that it is not to be taken to be the opinion of the Court, whatever my opinion might have been, that the caſe as it was ſtated originally by the report was attended with much difficulty.

Ex Parte Hubbard.

May 6th.

A priſoner who is taken in execution for more than 300*l.* and afterwards reduces his debt below that ſum is not entitled to be diſcharged under the lords' act in the next term after he has ſo reduced his debt, unleſs it be alſo the next term after he was taken in execution.

This was a petition by a priſoner in execution to be brought up to be diſcharged under the 32 *Geo.* 2. *c.* 28. *ſ.* 13. and was founded on the following circumſtances. The priſoner having been originally confined for ſeveral debts the amount of which was too large to entitle him to the benefit of the act, had during his confinement ſatisfied ſome of his creditors, and thus reduced the amount of his debts below 300*l.* He now therefore applied to the court in this term, as the term next after that in which he had thus reduced his debt to the ſum ſpecified in the 33 *Geo.* 3. *c.* 5., by which act the benefit of 32 *Geo.* 2. *c.* 28. is extended to perſons in execution for ſums not exceeding 300*l.*

Clayton Serjt. moved this on a former day and now urged in ſupport of the application that though the act directs perſons deſirous of being diſcharged under it to apply "before the end "of the firſt term which ſhall be next after ſuch priſoner ſhall "be charged in execution," yet it appears from the preceding parts of the clauſe that the legiſlature had in contemplation a caſe where the debt after that period was elapſed, had been reduced to the ſtipulated ſum. He cited in ſupport of this the words, "if any perſon ſhall be charged in execution for any ſum of money not exceeding in the whole the ſum of 100*l.* or on which execution *there ſhall at any time remain due* a ſum not amounting to above the ſaid ſum of 100*l.*" &c.

EYRE Ch. J. The material words of the act are "before "the end of the firſt term which ſhall be next after ſuch priſoner "ſhall be charged in execution by his creditor"; now this is not within the firſt term after this priſoner has been charged in execution, though it is the next term after that in which his debt has been reduced below the ſum limited. Indeed the Court will not be very anxious to eſtabliſh a precedent which will enable priſoners to deal with their creditors, and thus manage to prefer ſome of them by paying their debts, and come in under the lords' act againſt all the reſt. I had almoſt convinced myſelf that the application was reaſonable, and that we ſhould be juſtified in ordering the priſoner to be brought up; but upon examining the act, it appears that the caſe is not within the words, and conſidering the inconvenience that may reſult from extending it's proviſions in the way required, it ſeems more adviſeable to adhere to a ſtrict conſtruction.

ROOKE J. I am of the ſame opinion.

Clayton took nothing by his motion.

May 6th.

HILL *v.* REEVES.

The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt and been choſen aſſignee under a commiſſion of bankruptcy iſſued againſt the Defendant.

THE Plaintiff having proved his debt under a commiſſion of bankruptcy iſſued againſt the Defendant, and having been choſen one of the aſſignees, arreſted the Defendant and held him to bail.

Le Blanc Serjt. now ſhewed cauſe againſt a rule *niſi* obtained on a former day for cancelling the bail-bond and entering a common appearance, and contended that this application could not be attended to, ſince a party has a right to ſue his creditor even after he has received a dividend under the commiſſion (*a*).

Shepherd Serjt. in ſupport of the rule obſerved that this was not a motion to ſtay proceedings in the action, but merely to can-

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(*a*) *Ex parte Capot.* 1 *Atk.* 219. where the Plaintiff was alſo one of the aſſignees.

cel the bail-bond, on the ground of the hardſhip which the Defendant ſuſtained in being held to bail by the Plaintiff, who as aſſignee had poſſeſſed himſelf of all his property. He urged that the Plaintiff had elected his remedy, having completely adopted the commiſſion by becoming aſſignee and acting under it (*a*).

The Court refuſed to interfere, ſaying that the Defendant muſt apply to the Court of Chancery.

Rule diſcharged(*b*).

(*a*) *Vid. Aylett* v. *Harford* and *Richards* bail of *Lowe*, 2 *Bl.* 1317. where an execution was ſet aſide on the ground of the Plaintiff having adopted the commiſſion by acquieſcing under it for a year and acting as aſſignee.

(*b*) *Vid. ex parte Ward*, 1 *Atk.* 153. where it was ſaid that barely being aſſignee without proving a debt under the commiſſion did not amount to an election: and *Ex parte Dorvilliers*, 1 *Atk.* 221. where the ſame was held with reſpect to a party who had choſen himſelf aſſignee.

Watt and Another *v.* Daniel.

May 6th.

The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the defendant's witneſſes reſiding there, if from the pleadings it does not appear neceſſary to produce many witneſſes from that county, unleſs a queſtion be raiſed of which a fair trial cannot be expected there.

By indenture of the 21ſt of *November* 1780, executed in the county of *Cornwall*, an agreement was entered into between the Plaintiffs (the patentees of the new-invented ſteam-engine) and the Defendant's father (who was concerned in certain *Corniſh* mines) that the latter ſhould erect five ſteam-engines in *Cornwall* at his own expence, and pay the Plaintiffs a certain ſum of money monthly during the time he ſhould work them. Theſe monthly ſums were regularly paid up to the year 1793. The preſent action of covenant was brought to recover the arrears from that time, amounting to between eight and nine thouſand pounds.

A rule *niſi* having been obtained on a former day for changing the *venue* from *London* to *Cornwall*, on an affidavit that the Defendant muſt incur great expence in bringing up witneſſes from *Cornwall*, if the cauſe were tried in *London*, and that ſeveral perſons employed in ſuperintending the mines would be compelled to leave them, at a great inconvenience to the Defendant;

Palmer Serjt. now ſhewed cauſe, and relied on an affidavit ſtating that the Plaintiffs had reaſon to believe that a fair and impartial trial could not be had in the county of *Cornwall*, for that great prejudice had ariſen there reſpecting the cauſe in conſequence of calumnies which had been circulated concerning the Plaintiffs, and that a ſubſcription had been entered into to defray the expences of reſiſting the Plaintiff's demand. He obſerved that from the

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the nature of the caſe the queſtion to be tried muſt excite a ſtrong intereſt in the public mind in *Cornwall*, where ſo many perſons were under the ſame circumſtances as the Defendant; and referred to the caſes cited in the note to *Foſter* v. *Taylor*, 1 *Term Rep*. 781. He then adverted to the Defendants pleas (*a*) which were 1ſt, *Non eſt factum.* 2d. *Riens per diſcent.* 3d, That Defendant had ceaſed from a certain time to uſe the engines, and that they had paid 11,041 *l.* for the time during which they had uſed them. 4th nearly the ſame as the 3d. 5th *riens* in *arrere*; and ſaid, that with reſpect to the firſt plea one of the two witneſſes to the deed was the Defendant in the action: that the only fact to be proved under the third and fourth pleas, was the time during which the engines were worked, which might be done by any of the workmen who attended them; and that the affirmative of all the other pleas lay on the Plaintiffs. He added that a ſimilar application had been refuſed in the caſe of *Boulton* v. *Bull.*

Le Blanc Serjt. in ſupport of the rule, relied on the affidavit which ſtated the defendant's witneſſes to reſide in *Cornwall*, and contended that the plea ſhewed that all the evidence muſt come from that county. He inſiſted that nothing was to be apprehended from the prejudices of the county as the queſtion on the patent was now out of the caſe being admitted by the deed; and that as proof muſt be given of the times during which the engines were worked, and when they ceaſed working it would be neceſſary to bring up a number of witneſſes who had been employed about them.

Eyre Ch. J. There is no doubt that in a proper caſe the Court will order the venue to be changed notwithſtanding the Plaintiffs' right to lay it in any county. The queſtion then is, whether this be a proper caſe? The firſt plea is *non eſt factum.* Now where other pleas are pleaded, which ſhew that the deed has been acted under, I cannot think it right for the Court to give any indulgence on the ground of that plea. With reſpect to *riens per diſcent*, that does not require many witneſſes, nor that they ſhould reſide in the county of *Cornwall.* If the third and fourth pleas are to be underſtood as going ſingly to the point how long the engines have been in uſe, and whether any uſe has been made of them ſince the time alleged, two witneſſes will be ſufficient to prove that,

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(*a*) This he did from a notice of an application to plead thoſe ſeveral matters and which came on afterwards.

without

without calling all the county of *Cornwall*. The nature of the caſe therefore excludes the neceſſity of incurring great expence or inconvenience by drawing away from the mines perſons whoſe preſence may be material. But behind this narrow view of the ſubject I can ſee a caſe which may make it neceſſary for many witneſſes from the county of *Cornwall* to attend. I can hardly ſuppoſe that from the year 1793 the mines have been worked without any engines. Probably it will turn out that the Defendants mean to contend that the engines in queſtion have not been uſed becauſe others different in principle have been ſubſtituted for them. This would bring on the queſtion with reſpect to the infringement of the patent, and all the points formerly raiſed; upon which many perſons reſiding in *Cornwall* would be neceſſary witneſſes. But when that very queſtion was before the Court we were of opinion that the county was too much intereſted for ſuch a queſtion to be tried there. The only ground therefore on which the Court can allow this application in point of convenience is the very ground which has been decided upon as that on which the cauſe ought not to be tried in *Cornwall*. The narrow ſenſe of the pleadings does not call for the interference of the Court, and the other ſenſe renders it improper for the Court to accede to the application.

ROOKE J. of the ſame opinion.

Rule diſcharged.

Palmer then ſhewed cauſe againſt the rule for pleading the above ſeveral matters,

But the *Court* refuſed to interfere, and accordingly

That rule was made abſolute.

LISTER one &c. *v.* MUNDELL.

May 6th.

THIS was an application to have a writ of *fieri facias* ſet aſide, and the goods and money levied under it reſtored to the Defendant on the ground of his having become a bankrupt ſubſequent to the time when the cauſe of action accrued, and hav-

If a *fi. fa.* iſſued againſt a bankrupt before certificate obtained, be not executed till after, the Court will order the goods to be reſtored; even though he has not pleaded the certificate according to 5 G. 2. c. 30. *ſ.* 7. For the Court will always give that relief in a ſummary way which might be obtained by *auditâ querelâ*. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on a plea of bankruptcy. If the teſtimony of witneſſes on which a verdict has proceeded be founded on and derive it's credit from particular circumſtances, and thoſe circumſtances be afterwards clearly falſified by affidavit, the Court will grant a new trial.

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ing obtained his certificate between the day on which the writ of *fieri facias* iſſued and the day on which it was executed.

The debt accrued to the Plaintiff for buſineſs done as an attorney in *March* 1793: In *November* following the Defendant became a bankrupt and a commiſſion iſſued againſt him: The Plaintiff having declared in *aſſumpſit*, and the Defendant having pleaded the general iſſue, the cauſe was tried at the ſummer aſſizes for *York* 1798, and a verdict found for the Plaintiff: on the 13th *November* in the ſame year final judgment was ſigned, and the *fieri facias* ſued out: on the 14th the Defendant's certificate was allowed: and on the 23d of the ſame month the ſheriff levied under the *fieri facias* in *Yorkſhire*.

Le Blanc Serjt. in the laſt term oppoſed the application, as neither warranted by the 5 *Geo.* 2. *c.* 30. *ſ.* 7, which enables bankrupts to plead their certificate, and diſcharges them from all debts due before the bankruptcy, the Defendant in this caſe not having pleaded his certificate but only the general iſſue: nor by *ſ.* 13, which only authoriſes the Court to diſcharge the perſon of the bankrupt impriſoned after the certificate obtained (*a*).

Eyre Ch. J. By refuſing this application we ſhall drive the Defendant to his *auditâ querelâ*, and I take it to be the modern practice to interpoſe in a ſummary way in all caſes where the party would be entitled to relief on an *auditâ querelâ* (*b*).

Le Blanc then ſtated that the Defendant had loſt more than 5*l.* on one day by horſe-racing, and was therefore deprived of the benefit of the act by *ſ.* 12., and alſo that he had frequently promiſed payment of the debt ſince the certificate obtained.

Eyre Ch. J. Certainly if we entertain a ſummary juriſdiction in order to relieve a party from the neceſſity of having recourſe to an *auditâ querelâ* we muſt look into the circumſtances of the caſe, and ſee whether there be any thing to prevent the *auditâ querelâ* from taking effect. However as the facts now produced are collateral to the original motion the party ought to have an opportunity of anſwering them by affidavit.

(*a*) *Aſhdowne* v. *Fiſher*, *Barnes* 206. *ed.* 3. *Cellan* v. *Meyrick*, 1 *T. R.* 361.

(*b*) *Vid.* 3 *Bl. Comm.* 406. *Anon.* 1 *Salk.* 93. *Wicket* v. *Cremer*, 1 *Lord Raym.* 439 1 *Salk.* 264. S. C. *Cont. Calcraft* v. *Swann*, *Barnes* 204. *ed.* 3.

Le Blanc then ſuggeſted that the Court might direct a trial in the firſt inſtance in order to aſcertain the truth of the facts under a plea of bankruptcy.

The Court accordingly ordered the rule to ſtand over; the Plaintiff to deliver a declaration; the Defendant to plead his certificate: and the parties to go to trial at the enſuing aſſizes.

At the trial the principal point in diſpute was, whether a certain ſum of money had been loſt at the *Scarborough* races in *Auguſt* 1793, or in *Auguſt* 1792, the latter not being within twelve months previous to the bankruptcy. To prove that it was loſt in 1793, the Plaintiff produced three witneſſes, all of whom ſwore to the fact of the money having been loſt in 1793, and two of them founded their teſtimony on particular circumſtances within their recollection: viz. *Thomas Dinnis*, that till 1793 he had lived at *Hunmanby* in *Yorkſhire*, and on his leaving that place had come immediately to *Scarborough*; and *Fr. William Dove*, that a child of his died about a month before the race in queſtion took place. Verdict for the Plaintiff.

Cockell Serjt. early in this term moved for a rule *niſi* for a new trial, on two affidavits contradicting the particular circumſtances on which the two witneſſes abovementioned founded their teſtimony: *viz.* firſt, the affidavit of two perſons who had been overſeers of the poor of *Hunmanby* in the year 1791, and ſwore that *Thomas Dinnis* was maſter of the poor-houſe there and was paid off and diſcharged by the deponents on the 22d of *November* in that year, and that within a few days afterwards he went, and reſided at *Scarborough:* Secondly, the affidavit of two other perſons who together with the vicar of the pariſh where *William Dove* reſided, had examined the regiſtry of burials and found that a child of his had been buried there on the 17th of *Auguſt* 1792, and that no other child of his had been buried there ſince that time. The certificate of the vicar to that effect was alſo produced.

The Court obſerved that though it was unuſual to grant a new trial on evidence contradicting the teſtimony on which the verdict had proceeded, diſcovered ſubſequent to the trial(a), yet as the very facts on which theſe witneſſes had founded themſelves were falſified by the affidavits produced, they thought it afforded a ſufficient ground for a new trial, and accordingly granted a rule *niſi*:

(a) So an objection to the competency of witneſſes diſcovered ſubſequent to the trial is not a ſufficient ground for a new trial. *Turner* v *Pearte*, 1 *T. R.* 717.

Againſt this *Le Blanc* was now to have ſhewn cauſe, but on a queſtion from the Court he admitted that he could not contradict the affidavits which had been produced: and therefore the Court made

The rule abſolute.

IN THE EXCHEQUER CHAMBER.

May 6th.

Marryat *v.* Wilson in Error.

Under the late treaty between this country and the *United States of America* confirmed by 37 *Geo.* 3. *c.* 97. it is not neceſſary that the trade conceded to the *Americans* by the 13th Article ſhould be direct from *America* to the *Britiſh* ſettlements in the *Eaſt Indies*: it may be carried on circuitouſly through any country in *Europe*, including *Great Britain*. A natural-born ſubject of this country admitted a citizen of the *United States of America* either before or after the declaration of *American* independence, may be conſidered as a ſubject of the *United States* ſo as to entitle him to trade to the *Eaſt Indies* under the above treaty.

A writ of error having been brought in this Court on the judgment given in the Court of King's Bench between theſe parties, (*vid.* 8 *T. R.* 31.) the caſe was argued early in this term by *Rous* for the Plaintiff in Error and *Gibbs* for the Defendant; the general line of argument however being the ſame as that in the King's Bench, and much commented on in the judgment of the Court, it was thought unneceſſary to do more than ſubjoin in the form of notes to the following judgment whatever appeared at all new or material.

The Court took time to conſider of their opinion which was this day delivered by,

Eyre Ch. J. The ſubſtance of this record having been very recently ſtated to the Court and the record at large being to be found in the *Term Reports*, I ſhall content myſelf with referring to it, ſtating ſo much of it only as may be neceſſary to introduce the queſtions which have ariſen upon it. This is an action upon policies of inſurance ſet forth in the firſt third and fifth counts of the declaration. That in the firſt count being a valued policy on one moiety of the ſhip *Argonaut*, *Collet* maſter, at and from *Bourdeaux* to *Madeira*, and the *Eaſt Indies*, and back to *America*, with liberty to touch ſtay and trade at all ports and places whatſoever or whereſoever on the outward or homeward bound voyage; and this policy is ſtated and found to have been effected by the Plaintiff for the uſe of *John Collet*. The policy in the third count being a valued policy on goods neutral property on board the ſame ſhip on a voyage at and from *Bourdeaux* to the *Eaſt Indies* with liberty to touch call and trade at all ports and places or iſlands whatſoever and whereſoever as well at the *Cape* as on this or the other ſide of the *Cape of Good Hope*, until her arrival at her port of diſcharge in *Bengal*; and this policy is alſo ſtated and found to have been effected for the uſe of the ſaid *John Collet*. The policy in the fifth count being on goods warranted *American* property laden on board the ſame ſhip for a voyage at and from *Madeira* to her laſt port of diſcharge in India, with liberty to touch ſtay and trade at all ports places and iſlands whatſoever and whereſoever as well at, as on this and on the other ſide of the *Cape of Good Hope*; and this policy is ſtated and found to have been effected for the uſe of the ſaid *John Collet* and one *Anthony Butler*.

The Defendant underwrote all theſe policies, and a loſs has been ſuſtained both of ſhip and cargo which is admitted to be within the terms of the policy; but it has been inſiſted upon the part of the Defendant that the voyages deſcribed in theſe policies are illegal voyages, and as ſuch cannot be made the ſubject of contracts of this nature, and therefore that the Defendant is not bound by theſe contracts to make good his proportion of the loſs.

The facts of the caſe upon which this charge of illegallity is founded, as may be collected from the ſpecial verdict in this cauſe, are theſe: *John Collet* and *Anthony Butler* on whoſe account theſe policies were reſpectively effected, appear to have been natural-born ſubjects of his Majeſty but to have been reſident and domiciled within the *United States of America*, the latter before the declaration of the independence of the *United States* the former at a period ſubſequent to the ratification of ſuch independence. On the 12th of *June* 1795 they became the owners

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of this veſſel in moieties; on the 25th of *July* 1795 *Collet* ſailed in her as maſter, having a cargo of corn and flour on board from *Philadelphia* for *France*, with a view of proceeding from thence with the ſhip after the diſpoſal of her cargo there to *Madeira* and the *Eaſt Indies* and from thence back to the *United States*. On the 1ſt of *May* 1796 *Collet* arrived with this ſhip at *Breſt*, and there ſold his flour; he afterwards proceeded to *Bourdeaux* where he ſold the remainder of his cargo, and he there ſhipped on his own account the goods mentioned in the ſecond of theſe policies. While the ſhip remained at *Bourdeaux*, *Collet* came to *London*, and having procured a credit with the Plaintiff in this cauſe, he the Plaintiff purchaſed here upon his own credit by commiſſion goods and merchandize of *Britiſh* growth and of *Britiſh* manufacture on account of *Collet* and *Butler*, and theſe are the goods which are the ſubject of the third of theſe policies.

The Plaintiff by the direction of *Collet* and during his ſtay in *London* ſhipped theſe goods in the port of *London* on the joint account and riſk of *Collet* and *Butler* on board three *American* ſhips, in which they were carried from *London* to *Madeira* for the purpoſe of being there re-ſhipped and put on board the *Argonaut*, and of being carried in that ſhip together with the goods ſhipped on board her at *Bourdeaux* from *Madeira* to the *Britiſh* territories in the *Eaſt Indies*, and of being imported into thoſe territories and traded trafficked and adventured in there; and it appears that at the time of this loſs *Collet* and *Butler* remained debtors to the Plaintiff for the amount of theſe goods. On the 1ſt *May* 1796 the *Argonaut* ſailed from *Bourdeaux* with the goods there taken on board her for *Madeira* in order there to meet receive and take on board the goods ſhipped from *London*: ſhe arrived at *Madeira* and took thoſe goods on board there and afterwards ſailed from *Madeira* in the proſecution of her voyage to the *Eaſt Indies*, in the courſe of which voyage ſhe was ſeized by the commander of a ſquadron of the King's ſhips on ſuſpicion of being an illicit trader, and this has been conſidered throughout the cauſe on all ſides as a total loſs of the ſhip and cargo.

It ſeems to have been admitted on all ſides in this cauſe that this voyage and the trade and traffick intended to have been carried on by the *Argonaut* with the *Britiſh* territories in the *Eaſt Indies* is to be conſidered as illegal and the ſhip an illicit trader, unleſs the voyage and the intended trading were legalized by the treaty of commerce which was entered into between *Great Britain* and the *United States of America* on the 19th of *November* 1794, which was afterwards ratified by the *United States* on the 14th of *Auguſt* 1795, and by his Majeſty on the 28th of *October* in that year and retroſpectively confirmed by parliament in the 37 *Geo.* 3.

By the 11th article of that treaty it is agreed that there ſhall be a reciprocal and entirely perfect liberty of navigation and commerce between their reſpective people in the manner, under the limitations and on the conditions ſpecified in the treaty.

By the 13th article his Majeſty conſents that the veſſels belonging to the citizens of the *United States of America* ſhall be admitted and hoſpitably received in all the ſea-ports and harbours of the *Britiſh* territories in the *Eaſt Indies*, and that the citizens of the ſaid *United States* may *freely carry on a trade between the ſaid territories and the ſaid United States* in all articles of which the importation or exportation reſpectively to or from the ſaid territories ſhall not be entirely prohibited: Provided only that it ſhall not be lawful for them in any time of war between the *Britiſh* government and any other power or ſtate whatever to export from the ſaid territories without the ſpecial permiſſion of the *Britiſh* government there any military ſtores, or naval ſtores, or rice. The citizens of the *United States* are to pay no higher tonnage duty than *Britiſh* veſſels pay in the ports of the *United States*, and they are to pay the ſame import and export duties as are paid by *Britiſh* veſſels. It is expreſsly agreed that the veſſels of the *United States* ſhall not carry any of the articles exported by them from the ſaid *Britiſh* territories to any port or place except to ſome port or place in *America* where the ſame ſhall be unladen, and ſuch regulations ſhall be adopted by both parties as ſhall be found neceſſary to enforce the due and faithful obſervance of this ſtipulation. This article is not to extend to allow the veſſels of the *United States* to carry on any part of the coaſting trade of the *Britiſh* territories: and for explanation it is added, that veſſels going with their original cargoes or part thereof from one port of diſcharge to another are not to be conſidered as carrying on the coaſting trade. This article contains ſome other proviſions by which *Americans* are to govern themſelves in their intercourſe with the *Britiſh* territories, but nothing ariſes upon that part of the article material to the preſent ſubject.

On the part of Mr. *Marryat* the Defendant in the action, it has been inſiſted by Mr. *Rous* who entered very fairly into the real merits of the caſe, that according to the true conſtruction of this treaty, viewing it in all its parts and attending both to the letter and the ſpirit of it, the trade to be carried on between the *Britiſh* territories in the *Eaſt Indies* and the *United States*, is a direct and immediate trade from the *United States* to the *Britiſh* territories as well as from the *Britiſh* territories to the *United States*, which unqueſtionably muſt be direct and immediate, it being expreſsly agreed that the veſſels of the *United States* ſhall not carry any of the articles exported by them from the *Britiſh* territories in the *Eaſt Indies* to any port or place except to ſome port or place in *America* where the ſame ſhall be unladen; and conſequently that the voyages inſured from *Bourdeaux* and from *Madeira* not being protected by the moiety were *ex conceſſis* illegal.

Mr. *Rous*'s verbal criticiſm (*a*) upon the word "between" was ingenious, and well ſupported: but in truth there is hardly a word in the *Engliſh* language leſs preciſe in it's meaning or more indefinite in it's application than the word "between." According to the context it is uſed to expreſs the ſtricteſt local ſenſe of *to* and *from*, or the moſt remote relation which any one thing can have or bear to another. For inſtance, when we ſay that the inlet from the *Weſtern Ocean* to the *Mediterranean* is *between* the coaſt of *Spain* and the coaſt of the empire of *Morocco*, it marks geographical lines preciſely drawn. But if we were to ſay that the intercourſe *between* the coaſt of *Spain* and that of the empire of *Morocco* was interrupted by the religious opinions and the habits of living prevailing in the two countries, the word "between" would have no other effect than to point out the countries or nations whoſe intercourſe is ſpoken of as interrupted by the cauſes enumerated, and would mean no more than what is meant by the ſame word in the 11th article of this treaty where the expreſſion is "*between* their reſpective people." When we leave

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(*a*) To prove that the word *between* meant *to* and *from*, Mr. *Rous* referred to the ΕΠΕΑ ΠΤΕΡΟΕΝΤΑ of *John Horne Tooke*, part 1ſt, *p.* 404. *ed.* 2. where it is ſaid to be a dual prepoſition derived from the *Anglo-Saxon* imperative *be* and ꞇƿeᵹen or twain, and alſo to *Johnſon*'s Dictionary, where it is interpreted "from one to another."

this narrow ground of argument, and proceed to conſider the whole context of this article, the generality of the expreſſions, the moſt obvious interpretation of thoſe expreſſions, and all the probable and poſſible conſequences which may follow from our expoſition of this article, the ſubject expands itſelf to an alarming magnitude, and the argument would take a very wide compaſs indeed, if it were now to be entered into for the firſt time: but after the very elaborate diſcuſſion which this cauſe has undergone in the Court of King's Bench, where a ſolemn judgment was pronounced at the cloſe of a fourth argument, and conſidering that that judgment has now been ſubmitted to our review upon arguments which, though very ably put, have not materially varied the ſtate of the queſtions which have been made and decided upon by that Court, we do not feel ourſelves called upon to enter very much at large into the ſubject, and I ſhall content myſelf with ſtating as ſhortly as I can the grounds upon which the unanimous opinion of this Court that the judgment of the Court of King's Bench is not erroneous and ought to be affirmed may be ſupported.

The language of the 13th article is that the citizens of the *United States* may freely carry on a trade between the ſaid territories and the ſaid *United States* in articles not entirely prohibited. They are therefore not reſtricted to trade in articles of the growth produce and manufacture of the *United States:* it is enough that the articles they trade in are not articles prohibited from being imported to the *Britiſh* territories in *India*, or exported from thence by any body. If then they propoſe to trade with the *Britiſh* territories in *India* in foreign commodities as they may do, they muſt uſe means to furniſh themſelves with thoſe commodities. In the nature of things it muſt be done in a courſe of trade. The obvious courſe of trade is that they ſhould carry their native commodities to other countries where they can be exchanged with the moſt advantage for articles proper for the *Eaſt India* market, and that they ſhould then proceed to *India* in order to carry on a trade there in thoſe articles. I find nothing in the treaty which will warrant me in ſaying that it was the intention of the contracting parties that the trade conceded by the treaty ſhould not be ſo carried on. Mr. *Rous* found himſelf obliged to acknowledge that the citizens of the *United States* might within the terms of this treaty firſt import into *America* the articles in which they propoſe to

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trade with the *Britiſh* territories in *India*, and then export them from *America* in a direct voyage to the *Eaſt Indies*, and he could not deny that they might have imported theſe articles into *America* even from *London*. Indeed it would have been a moſt extraordinary ſtate of things if they might have gone to every other market for the goods they wanted, but that the *Britiſh* market was excluded. And as to the apparent diſadvantage under which the citizens of the *United States* would carry on trade with the *Britiſh* territories in *India* ſo conducted, Mr. *Rous* argued, that ſo to underſtand the treaty would be only to give the fair and due preference to the great national commerce of the *Eaſt India* Company. Whether this trade ſhould have been conceded under any qualifications or reſtrictions is one thing, it having been conceded now, to attempt to cramp it by a narrow, rigorous, forced conſtruction of the words of the treaty is another and a very different conſideration. We cannot ſuppoſe that an indirect advantage was intended to be reſerv'd to the *Eaſt India* Company by ſo framing the treaty that the *American* trade might by conſtruction be put under diſadvantage; becauſe this would be a chicanery unworthy of the *Britiſh* government and contrary to the character of it's negociations, which have been at all times diſtinguiſhed for their good faith to a degree of candour which has been ſuppoſed ſometimes to have expoſed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted in my opinion fixes the conſtruction of the grant. If it were neceſſary to go farther ſtrong arguments may be drawn from the context of this article and the contraſt, which the comparing it with the preceding article, will produce. From the context it appears that the trade was to be *free*, ſubject only to certain ſpecific regulations. The citizens of the *United States* are put upon the ſame footing as to duties with *Britiſh* ſubjects. No queſtion is propoſed, no means of aſcertaining the fact are provided, where they come *from*, though it is anxiouſly ſtipulated where they are to go *to*. The words "*original cargo*" are to be found in the article and it was ſuppoſed they might be uſed as a ground to infer that the trade was to be direct from the *United States*. But "*original cargo*" is plainly ſet in oppoſition to the cargo to be taken in in *India*. The proviſion reſpecting it is that though the coaſting trade is not permitted to the citizens of the *United States*, they may carry the cargo, which they originally brought with them, into the ports of the *Britiſh* territories from one port of delivery to another for the purpoſe of a market. The word *original* ſerves the purpoſe for which it is uſed perfectly well, and it marks a total indifference to the queſtion where the cargo was picked up. I have already had occaſion to take notice that as to the cargo to be imported no other reſtriction or qualification was in the view of the contracting parties than that it ſhould conſiſt of articles not expreſsly prohibited. But when this article is contraſted with the preceding article, the true conſtruction of it will be ſeen in a ſtill clearer point of view. The 12th article is in ſubſtance, that it ſhall be lawful for the citizens of the *United States* to carry *to* any of his Majeſty's iſlands and ports in the *Weſt Indies from* the *United States* in their own veſſels, not being above ſeventy tons, any goods or merchandize being of the growth manufacture or produce of the ſaid ſtates, which *Britiſh* veſſels might carry to the iſlands from the ſaid ſtates, and that the citizens of the *United States* may purchaſe load and carry away in their ſaid veſſels to the *United States* from the iſlands all ſuch articles being of the growth manufacture or produce of the iſlands as *Britiſh* veſſels could carry from thence to the ſaid ſtates, provided that the *American* veſſels carry and land their cargoes in the *United States* only, it being agreed *that the* United States *are to prohibit and reſtrain the carrying any molaſſes ſugar coffee cocoa or cotton in* American *veſſels either from his Majeſty's iſlands or from the* United States *to any part of the world except the* United States, and there is a proviſo that *Britiſh* veſſels may import from the iſlands into the *United States*, and may export from the *United States* to the iſlands, all articles of the growth produce or manufacture of the iſlands or of the *United States* reſpectively, which by the laws of the ſaid ſtates might be then imported or exported.

The trade to be carried on between the citizens of the *United States* and the *Britiſh Weſt India* iſlands, by virtue of this article, is required to be in goods of the growth produce or manufacture of the iſlands and *United States* reſpectively. This trade in the nature of it muſt be immediate and direct. It could not be in the contemplation of the contracting parties that it might be circuitous, except indeed within the limits of the *United States* and within the range of the *Britiſh Weſt India* iſlands, and ſo far as I take it, it is circuitous. The contracting parties could not look

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to ſo remote a poſſible caſe as that a citizen of the *United States* might load the native commodities of the *United States* in a foreign port, and therefore we are not driven to collect the meaning of this article from the preciſion of the language it uſes. Its language is however moſt preciſe. The *terminus à quo* and the *terminus ad quem* are deſigned with as much certainty as would be required in an indictment for not repairing a particular part of the King's highway. And to exclude all poſſibility of miſapprehenſion, to mark how entirely this trade was to be immediate and direct, a proviſion is added that the *United States* are to prohibit the carrying goods of the produce of the *Weſt India* iſlands in *American* veſſels to any port of the world except the *United States*. Thus contraſted, thoſe articles afford an illuſtration of the internal evidence of the import and true intent and meaning of each conſidered ſeparately, and the concluſion from the whole appears to us to be irreſiſtible that the trade to be carried on under the 12th article between the *United States* and the *Britiſh Weſt India* iſlands is a direct trade, and that the trade to be carried on between the *United States* and the *Britiſh* territories in the *Eaſt Indies* under the 13th article may be as circuitous as the enterpriſing ſpirit of commerce can make it. There may be reaſon to apprehend that ſuch an intercourſe with the *Britiſh* territories in the *Eaſt Indies* may prove very injurious to the intereſts of the *Eaſt India* Company, and to *Great Britain* in reſpect of the great national commerce which is carried on by that Company. In particular there may be reaſon to apprehend that this treaty will open a door to many of our own people whom the policy of our laws has ſhut out from a direct trade to the *Eaſt Indies*. In truth it can hardly be expected that the ſpirit of commerce, too often found eluding laws made to keep it within bounds, that the *lucri bonus odor* ſhould not embark *Britiſh* capital in this trade. This ought to have been foreſeen, and therefore I conclude it was foreſeen, and that it was found that the balance of advantage and diſadvantage preponderated in favour of the treaty. If not; thoſe who adviſed it will have to anſwer for it: the reſponſibility is not with us. We are not even the expounders of treaties. This treaty is brought under our conſideration incidentally as an ingredient in a cauſe in judgment before us: we only ſay how it is to be underſtood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern ourſelves. We are to conſtrue this treaty as we would conſtrue any other inſtrument public or private. We are to collect from the nature of the ſubject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are *A.* and *B.*, or happen to be two independent ſtates. The Judges who adminiſter the municipal laws of one of thoſe ſtates would commit themſelves upon very diſadvantageous ground, ground which they can have no opportunity of examining, if they were to ſuffer collateral conſiderations to mix in their judgment on a caſe circumſtanced as the preſent caſe is. It has been urged that in this inſtance (at leaſt as to the goods in the third policy) this was a commerce direct from this country, and that this treaty does not open a trade between *Great Britain* and the *Britiſh* territories in the *Eaſt Indies* to the prejudice of the monoply veſted in the *Eaſt India* Company. This objection is plauſible but not founded. The circumſtance that this part of the cargo of the *Argonaut* was procured here, and the ſhare which the plaintiff *Wilſon* had in procuring it, might have deſerved conſideration as evidence of a colluſion by means of which *Wilſon* was carrying on for himſelf an illicit trade to the *Eaſt Indies* which might have ſubjected this ſhip and cargo, or this part of the cargo, to ſeizure and confiſcation. But this uſe has not been made of the facts found by the ſpecial verdict: and no other uſe, conſiſtent with our opinion of the legal effect of the treaty, could be made of them. For a citizen of the *United States* being allowed to trade to the *Britiſh* territories in *India* generally with an exception of a few articles only, as he may take in his cargo in the ports of his own country, ſo he may take it in in the ports of this country as well as any other; and he may employ an agent, and that agent may be a *Britiſh* ſubject. It is a lawful agency. It ſeems to me impoſſible to maintain in argument that the ſubject of a nation in amity who may trade to the *Britiſh* territories in *India* ſhould be excluded from one market for his outward inveſtment when all other markets are open to him, and when it is diſtinctly admitted that the markets of all the world, including ours, *circuitouſly* muſt be open to him.

There remains one other topic of which I am called upon to take ſome notice. It is ſaid that *Collett*, who is ſolely intereſted in the two firſt of theſe policies, and has a joint intereſt with *Butler* in the laſt, being a natural born ſubject of this country,

cannot

cannot ſhake off that character, and become an *American* ſo as to entitle himſelf to the protection of this treaty. He is a *Britiſh* ſubject trading to the *Eaſt Indies*: his trade is therefore illicit: the voyages inſured are illegal: and the policies are void. Or perhaps the objection ought to be put another way thus. The veſſels in which only the trade can lawfully be carried on between the *United States* and the *Britiſh* territories in *India* according to the proviſions of the Statute 37 *Geo.* 3. *c.* 97. muſt be owned by ſubjects of the *United States*, and whereof the maſter and three-fourths of the mariners at leaſt are ſubjects of the *United States*: whereas this veſſel the *Argonaut* was in part the property of a natural-born ſubject of this country, and this part-owner was alſo the maſter: conſequently ſhe was not owned by a ſubject of the *United States*, nor navigated by a maſter a ſubject of the *United States*, within the true intent and meaning of the navigation laws, and particularly the Statute 37 *Geo.* 3. *c.* 97. The concluſion will be the ſame. The voyages inſured were therefore illegal and the policies void. This is the only point in the caſe which has appeared to me to have any difficulty in it. I muſt confeſs that when I found it ſtated as a fact in this ſpecial verdict that *Collett* and *Butler* were natural-born ſubjects of his Majeſty, I felt myſelf embarraſſed, and I could not readily diſengage myſelf. And when I found that in the year 1797 there had been a reference(*a*) from the Privy Council to

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(*a*) By 37 *Geo.* 3. *c.* 97. *ſ.* 1. goods of the growth of *America* are allowed to be imported into *Great Britain* from the *United States of America* in *Britiſh* ſhips owned navigated and regiſtered according to law, or *American* ſhips " whereof the maſter and " three-fourths of the mariners at leaſt are " ſubjects of the ſaid *United States*" On this a queſtion aroſe, whether one *Smith* who had become a citizen of the *United States* ſince the declaration of independence, and came here as maſter of an *American* veſſel, was within the meaning of the act. The caſe was ſubmitted to the opinion of the King's Advocate and the Attorney and Solicitor General; which was as follows:

' To the Lords of His Majeſty's Moſt Honourable Privy Council.

May it pleaſe your Lordſhips,

In obedience to your Lordſhips' order of the 16th inſtant, referring to us the petition of *John Montgomery*, the repreſentation of *Simon Cook*, and papers accompanying the ſame, to your Lordſhips' order annexed, and requiring us to conſider thereof, and report, whether *Alexander Smith* therein named is to be conſidered according to the true conſtruction of his Majeſty's order in council of the 31ſt *May* 1797, for regulating the trade between *Great Britain* and the teritories belonging to the *United States of America*, as a ſubject of the *United States of America*, and whether he is entitled to be maſter of a ſhip belonging to the ſaid *United States* trading to this country, and to confer on the ſaid ſhip the benefit of the ſaid order in council: We have conſidered the ſaid papers ſo referred to us, and we are of opinion, that *Alexander Smith*, being a natural-born ſubject of his Majeſty, and not having been admitted a citizen of the *United States of America* until the 6th of *May* 1796, cannot be conſidered, with reſpect to this country, as a ſubject of the *United States*, ſo as to entitle him to be maſter of a ſhip belonging to the *United*

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to the then Advocate General, and the two law officers of the Crown, and that they had concurred in opinion that the maſter of an *American* veſſel a ſubject of the *United States* domiciled there, but in fact a natural-born ſubject of *Great Britain* was not to be conſidered as a ſubject of the *United States* within the meaning of our navigation laws, founding themſelves upon an opinion of Lord *Hardwicke* when he was Attorney General, and that the Council had adopted and acted upon that opinion, I felt my difficulty increaſe upon me: for, though this was not a judicial deciſion, (as in the argument at the bar of the Court of King's Bench it was ſuppoſed to be,) it was certainly of the higheſt authority next to a judicial deciſion; it was a public act of the executive government, founded on the advice of eminent and learned men, whoſe ſituations called upon them to make themſelves well acquainted with our naviga-

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United States trading to this country, and to confer on the ſaid ſhip the benefit of the ſaid order in council. We apprehend that this point was ſubmitted to the opinion of Sir *Philip Yorke* [1], in 1732, in the caſe of a *Scotchman*, who had been made a burgher of *Stockholm*, and was the maſter of a *Swediſh* ſhip navigated with *Swediſh* mariners; and that he thought this would not entitle the *Scotchman* to be conſidered as a *Swede* in *Great Britain*, his native country.

All which we humbly ſubmit to your Lordſhips' conſideration.

June 19, 1797.
WILLIAM SCOTT,
JOHN SCOTT,
JOHN MITFORD.

In conſequence of the above opinion the following letter was written for the information of the Lords Commiſſioners of the Treaſury, and acted upon by them:

Council-Office, Whitehall,
23d *June* 1797.

Sir,

The Lords of his Majeſty's moſt honourable Privy Council having had under conſideration a report of his Majeſty's Advocate, Attorney and Solicitor General, on the petition of *John Montgomery*, and a repreſentation of *Simon Cock* his agent, and papers accompanying the ſame, requeſting the entry at the port of *Liverpool* of the *American* ſhip *America*, *Alexander Smith* maſter, from *New York*; notwithſtanding it has been objected to, on the grounds of the maſter of the ſaid ſhip not poſſeſſing all the qualifications of an *American* ſubject; I am commanded by their Lordſhips to tranſmit a copy of the ſaid report to you for the information of the Lords Commiſſioners of his Majeſty's Treaſury, and I am to ſignify that the Lords of the Council agree in opinion with his Majeſty's Advocate, Attorney and Solicitor General, that a *Britiſh* ſubject cannot ſo diveſt himſelf of the character of a *Britiſh* ſubject, by being naturalized or becoming a citizen of any foreign ſtate, as to entitle him to be conſidered, in this country, as a ſubject of ſuch foreign ſtate, under the laws of navigation. And their Lordſhips are further of opinion, that for many reaſons it would be very contrary to the intereſt of this country to admit of ſuch a claim, yet, as this is the firſt caſe with reſpect to the *United States of America* in which a claim of this nature has been brought forward, their Lordſhips do not think it would be proper to take advantage of the forfeiture of the ſaid ſhip, &c. and are even of opinion, that under all the circumſtances of the preſent caſe, the ſaid ſhip *America* ſhould, according to the requeſt of the memorialiſt, be permitted to enter the cargo at the port of *Liverpool*; I am however directed by their Lordſhips to deſire that a copy of the ſaid report may be tranſmitted to the Commiſſioners of his Majeſty's Cuſtoms, and that they may be informed, that after ſuch notice a like indulgence will not be granted.

I am, &c.

Geo. Roſe Eſq. W. FAWKENER.

[1] Vide *Reeve's Law of Shipping*, 252.

tion laws, and muſt have made them very familiar with all the queſtions which had ariſen upon thoſe laws: and it was therefore entitled to very great reſpect from me. It may be obſerved, that this order might have been followed by a judicial deciſion. It purports to recommend, that under the actual circumſtances the veſſel ſhould be admitted to an entry though ſhe was not navigated according to law. Notwithſtanding the order and the entry in conſequence of it, the veſſel might have been ſeized and proſecuted in the Exchequer, and ſo the queſtion might have been brought to a judicial deciſion. It was done in the caſe of *Scott qui tam* v. *Schwartz*, *Com.* 677. cited in the argument. By the way I do not underſtand upon what ground the caſe of *Butler* was diſtinguiſhed from *Collett*'s caſe, unleſs *Butler* has been expreſsly diſcharged from his allegiance by act of parliament, in conſequence of our acknowledgment of the independence of the *United States*. They were both natural-born ſubjects, they were both adopted ſubjects of the *United States*, and it is to be ſaid of both *Nemo patriam in quâ natus eſt exuere, nec legeantiæ debitum ejurare poſſit*. It was obſerved by Lord *Hale*, that a natural-born ſubject of this country may by foreign naturalization entangle himſelf in difficulties and a conflict of duties. So may the naturalized or denizen ſubject of the King of *Great Britain*. Yet it is clear, that we and all the civilized nations and ſtates of *Europe* do adopt (each according to their own laws) the natural-born ſubjects of other countries. So, as I take it, *Vattel* (*a*) puts it in the paſſages referred to. Our laws give certain privileges and withhold certain privileges from our adopted ſubjects, and we may naturally conclude, that there may be ſome qualification of the privilege in the laws of other countries. But our reſident denizens are entitled, as I take it, to all ſorts of commercial privileges which our natural-born ſubjects can claim. We ſhould conſider them as *Engliſh* in the language of the Navigation Act. The *United States* do undoubtedly conſider their adopted ſubjects as ſubjects of the *United States* within their laws. And I take it that we ſhould conſider their adopted ſubjects, if they happen not to be natural-born ſubjects of the King of *Great Britain*, as ſubjects of the *United States* within our navigation laws. To this propoſition I take the caſe of *Scott* v. *Schwartz* to be in point, if it wanted an authority. The caſe now begins to work itſelf clear. It comes to this queſtion: What difference does the circumſtance of the adopted ſub-

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(*a*) *Lib.* 1. *c.* 19. *ſ.* 212. *et ſeq.*

ject of the *United States* being a natural-born ſubject of the King of *Great Britain* make? Is there any general principle in the law of nations (out of which this adoption of ſubjects ſeems to have grown) that in the parent ſtate the adopted ſubject is incapable of enjoying the privileges which have been conceded by the parent ſtate to the other ſubjects of that ſtate which has adopted him? I know of no ſuch diſabling principle. Let us then come to our own municipal law. Lord *Hale* ſays foreign naturalization may involve the natural-born ſubject in a conflict of duties. This is eloquence but not preciſion. What are the duties of which there may be a conflict? Our laws pronounce, that if there ſhould be war between his parent ſtate and the ſtate which has adopted him, he muſt not arm himſelf againſt the parent ſtate. Perhaps they go further and ſay, that if he is here he may be prevented from returning to his domicile in the ſtate which has adopted him: that if he is there, he muſt on receiving the King's commands under his privy ſeal return hither on pain of incurring a contempt and penalties conſequent upon it. Whether the proclamation (*a*) which has been introduced into this cauſe will have the ſame effect as a privy ſeal ſerved upon the party, is a queſtion not neceſſary to be here diſcuſſed. It cannot have a greater effect, nor an effect of a different nature, and may therefore be laid out of the caſe. Our municipal laws may attach upon him in ſome other caſes, but I conclude in no inſtance which by analogy can govern the preſent caſe, becauſe I have heard of no ſuch argument from analogy. Upon what authority then is it ſaid, that a natural-born ſubject of the King of *Great Britain* ſhall not trade to the *Eaſt Indies*, though he is an adopted ſubject of another country whoſe ſubjects in general are allowed to trade to the *Eaſt Indies?* Shall it be enough to ſay the reſt of the King's ſubjects are not allowed to trade to the *Eaſt Indies*, and therefore you being the King's ſubject ſhall not? He will anſwer, I have a privilege which the reſt of the King's ſubjects have not. I am the King's ſubject, but I am alſo the ſubject of the *United States*, and *Great Britain* has granted to the ſubjects of the *United States* that they may trade. He may add, I violated no law of my parent ſtate, in procuring myſelf to be received a ſubject of the *United States*. She encourages the practice, for ſhe herſelf adopts the ſubjects of other ſtates. Why then are the fruits of my adoption to be withheld from me? If it be ſaid to him, you a *Britiſh* ſubject ought not to trade to the loſs and injury of the *Eaſt India* Company

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(*a*) 8 *Term Rep.* 34.

who

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who have a monopoly: he may ſay, the ſubjects of the *United States* may and ought to carry on this trade under the authority of the laws of this country; under the authority of the ſame laws which gave to the *Eaſt India* Company their monopoly. If the Company ſuſtain a loſs, it is *damnum ſine injuriâ*. In ſhort, it being once granted that natural-born ſubjects of the King of *Great Britain* may become a ſubject of the *United States*, there can be no breach of moral, political, or legal duties, no conflict of duties in claiming or exerciſing the privileges which belong to that character. The ſame train of reaſoning, in my judgment, goes to prove that it is not yet ſufficiently eſtabliſhed to be now taken for clear law upon the ground of which we ought to declare theſe contracts void, that a natural-born ſubject of the King naturalized, or otherwiſe adopted as a ſubject by a foreign ſtate, is not to be conſidered within our navigation laws as a ſubject of that foreign ſtate when acting in the character of the maſter of a veſſel belonging to the ſubjects of that foreign ſtate. Such a man is certainly to many purpoſes, "of that country or place" which are the words of the Navigation Act, and "a ſubject of the *United States*," which are the words of the Stat. 37 *Geo.* 3. *c.* 97. In point of title to this character of ſubject, he is ſufficiently ſo within our navigation laws. I mean that he is ſufficiently adopted, according to the caſe in *Comyns*, to be conſidered a ſubject of that country within our navigation laws, ſuppoſing his claim not to be repelled by his being a natural-born ſubject of *Great Britain*. I am not prepared to ſay, highly as I reſpect the authority of thoſe who held that opinion, that this character of natural-born ſubject will control or ſuſpend the legal operation of that of a ſubject of the *United States*. There is here no conflict of duties. Both characters may ſtand together; and if ſome political inconveniences, ſuch as thoſe ſuggeſted in the argument before us, (though theſe ſeem very remote,) ſhould follow, yet if theſe inconveniences are not of conſequence enough to prevent the practice of the adoption of ſubjects by *Great Britain* and every other ſtate in *Europe*, we cannot ſatisfy ourſelves that they ought to control the legal conſequences of that adoption. We are of opinion that there is no error in this judgment, and that it ought to be affirmed.

Judgment affirmed.

Mr. Juſtice **BULLER** was abſent from the 20th and Mr. Juſtice **HEATH** from the 24th of *April* to the end of the term, from indiſpoſition.

END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Trinity Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

1799.

WILTON Executrix *v.* HAMILTON.

May 6th.

A. ſued as executrix of *B.* on a policy effected by *B.* in his life-time, in which he was jointly intereſted with *C.* and *D.* now living, and was nonſuited, held that ſhe was entitled to the privilege of an executrix to be exempt from coſts.

THIS was an application to the Court to direct the prothonotary to tax coſts againſt the Plaintiff who had been nonſuited. The ground on which it was attempted to differ this from the common caſe of an executrix were as follow. The plaintiff declared as executrix of her huſband on a policy of aſſurance effected by him in his life-time, and in which he was jointly intereſted with two others. The 1ſt count ſtated, that the teſtator in his life-time, for the uſe of himſelf, *S. L.* and *S. B.*, effected the policy for himſelf, and as agent, *&c.;* that the teſtator, *S. L.* and *S. B.*, were intereſted *&c.;* that afterwards, *in the life-time of the teſtator*, the ſhip ſailed on her voyage, *and that afterwards* and during the voyage ſhe was loſt. The 2d count only differed from the firſt in ſome circumſtances which could not effect this motion. The 3d and 4th were money counts, ſtating that the defendant was indebted to the plaintiff as executrix, for money paid by the teſtator in his life-time to the uſe of the defendant, and for money had and received by the defendant in the life-time of the teſtator to his uſe.

Heywood Serjt. moved this on the laſt day of *Eaſter* term, but was at that time refuſed a rule *Niſi* by the Court, who ſaid they would not ſtir the point unleſs upon further conſideration of the caſe he ſhould think the motion well founded.

Accordingly on this day he again applied for a rule to ſhew cauſe and contended, that this caſe did not fall within the general rule, that where an executor ſues in right of his teſtator for a cauſe of action ariſing in the life-time of his teſtator, and the eſtate will be benefited by a recovery, he ſhall not pay coſts. 1ſt, Becauſe it did not appear upon the pleadings that the cauſe of action accrued in the life-time of the teſtator, for though the policy was ſtated in the two firſt counts to have been made by him, yet it was not ſhewn that the loſs happened before his death, and the money counts were on promiſes made to the plaintiff. 2dly, Becauſe the damages if recovered would not have been aſſets, but muſt have been carried to the partnerſhip fund and liable to the partnerſhip debts; and 3dly, becauſe it was not neceſſary for the executrix to have brought this action, as either of the ſurviving parties intereſted might have ſupported it. He cited *Jenkins and Wife* v. *Plombe*, 6 *Mod.* 92. 181. *Modely and Wife* v. *York*, 11 *Mod.* 135. *Marſh* v. *Yellowley*, 2 *Str.* 1106. *Nicolas* v. *Killigrew*, 1 *Ld. Raym.* 436. *Harris et Ux.* v. *Hanna*, *Caſ. temp. Hardw.* 204. and *Bollard* v. *Spencer*, 7 *Term Rep.* 358.

Le Blanc Serjt. ſhewed cauſe in the firſt inſtance, and inſiſted, that it might be inferred from the pleadings that the cauſe of action accrued during the life of the teſtator.

Eyre Ch. J. On the two firſt counts we may infer, that the loſs happened in the life-time of the teſtator, and with regard to the money counts, the promiſe is an implication of law, ſince the teſtator is the perſon to whom the debt is ſubſtantially due. The Plaintiff was entitled to bring this action, and ſhe could only bring it in right of her teſtator. The rule of law is clear. With regard to ſuch cauſes as fall under the cognizance of the executrix herſelf, ſhe ſues at her peril; the privilege is given on account of the ſituation in which ſhe ſtands as to thoſe claims of the teſtator which were executed in his life-time. It is her duty to convert thoſe claims into aſſets, which ſhe muſt do with ignorance and uncertainty, and on that account ſhe is protected from coſts.

Buller J. I am of the ſame opinion. It makes no difference that the ſurviving parties for whoſe intereſt this policy was made might have brought the action in their own names.

Heywood took nothing by his motion.

1799.
May 30th.

SARAH LEGH *v.* FRANCES LEGH.

If the obligor of a bond, after notice of its being aſſigned, take a releaſe from the obligee, and plead it to an action brought by the aſſignee in the name of the obligee, the Court will ſet the plea aſide; nor will they under theſe circumſtances allow the obligor to plead payment of the bond.

ON a former day *Shepherd* Serjt. ſhewed cauſe againſt a rule *Niſi* obtained by *Le Blanc* Serjt. for ſetting aſide a plea of releaſe in an action on a bond, and ordering the releaſe to be cancelled.

The caſe as diſcloſed by the affidavits in ſupport of the rule appeared to be this: *Frances Legh* having given a bond to *Sarah Legh* to ſecure 75 *l. Sarah* aſſigned it to *John Legh* as a ſecurity for the payment of a leſſer ſum, of which *Frances* had notice: *John* having brought an action on the bond againſt *Frances* in the name of *Sarah*, *Sarah* gave a releaſe to *Frances* by whom ſhe had been ſatisfied her debt, and this releaſe was pleaded.

EYRE Ch. J. The conduct of this Defendant has been againſt good faith, and the only queſtion is, whether the Plaintiff muſt not ſeek relief in a Court of Equity? The Defendant ought either to have paid the perſon to whom the bond was aſſigned, or have waited till an action was commenced againſt him, and then have applied to the Court. Moſt clearly it was in breach of good faith to pay the money to the aſſignor of the bond and take a releaſe, and I rather think the Court ought not to allow the Defendant to avail himſelf of this plea, ſince a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the coſts of the application.

BULLER J. There are many caſes in which the Court has ſet aſide a releaſe given to prejudice the real Plaintiff. All theſe caſes depend on circumſtances. If the releaſe be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary, in order to aſcertain what ſum was really due to the Plaintiff on the bond.

Shepherd on this day ſtated that the Defendant objected to going before the prothonotary, upon which the *Court* ſaid, that the rule muſt be made abſolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the Statute to plead ſeveral pleas, the Court had no diſcretion.

EYRE Ch. J. The Court has in many caſes refuſed to allow a party to take his legal advantage, where it has appeared to be againſt good faith. Thus we prevent a man from ſigning judgment who has a right by law to do ſo, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a releaſe; and I think therefore the plea of releaſe may be ſet aſide conſiſtently with the general rules of the Court (*a*). And if ſo, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the ſame thing.

Buller J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment againſt the nominal obligee.

Upon this the Defendant conſented to go before the prothonotary.

May 30th.

DONNELLY *v.* DUNN.

If bail plead the bankruptcy of their principal in their own diſcharge, they muſt plead it circumſtantially, or it will be bad on ſpecial demurrer. *Quære* if it can be pleaded at all?

DEBT on a recognizance againſt the Defendant as bail of one *Robert Maclagan*. Plea: That the ſaid *Robert Maclagan* after the entering into the recognizance in the declaration mentioned and before the return of any writ of *capias ad ſatiſfaciendum* againſt the ſaid *Robert Maclagan* upon the ſaid judgment in the ſaid declaration alſo mentioned to wit on *&c.* at *&c.* became and was a bankrupt within the true intent and meaning of the ſeveral Statutes made and then and now in force concerning bankrupts And that the ſaid *Robert Maclagan* having ſo become and being ſuch bankrupt as aforeſaid afterwards and before the return of any writ of *capias ad ſatiſfaciendum* againſt him upon the ſaid

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(*a*) See alſo *Payne* v. *Rogers*, *Dougl.* 407. where the tenant of a commonable tenement, having been made nominal Plaintiff by his landlord in an action on the caſe for an incroachment on the common, gave a releaſe to the Defendant pending the ſuit, the Court on motion ordered the releaſe to be delivered up to be cancelled, and permitted the action to proceed in the name of the tenant, expreſſing great indignation at the attempt made to prevent it. Indeed in *Salk.* 260. *Holt* Ch. J. ſays, that in ejectment where the Plaintiff is a mere nominal perſon and truſtee for the leſſor, if he releaſe the action he may be committed for a contempt. *Lawrence* J. mentioning this opinion in the caſe of *Bauerman* v. *Radenius*, 7 *Term Rep.* 670. adds "but he did "not ſay that the releaſe would not defeat "the action." If it would neceſſarily defeat the action, an objection might have been taken to the pleading in *Craib and Wife* v. *D'Aeth*, 7 *Term Rep.* 670. n. *b.*, where a releaſe having been pleaded to an action on a bond by the aſſignee of the bond in the name of the obligee, the ſpecial circumſtances under which the releaſe was given, and that it was obtained by fraud, were replied.

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ſaid judgment to wit on &c. at &c. a certain commiſſion of bankrupt was in due manner awarded and iſſued forth againſt him the ſaid *Robert Maclagan* under the great ſeal of *Great Britain* directed to certain commiſſioners therein named under which ſaid commiſſion he the ſaid *Robert Maclagan* was afterwards in due manner adjudged and declared a bankrupt to wit at &c.; that the ſaid *Robert Maclagan* having been ſo adjudged and declared bankrupt as aforeſaid and having in all things conformed himſelf as ſuch bankrupt to the ſeveral ſtatutes concerning bankrupts, he the ſaid *Robert Maclagan* afterwards and before the return of any writ of *capias ad ſatisfaciendum* againſt him upon the ſaid judgment in the ſaid declaration mentioned to wit on &c. at &c. in due manner obtained from the major part of the commiſſioners acting under the ſaid commiſſion and from ſufficient in number and value of the creditors who had proved their debts under the ſaid commiſſion his certificate of conformity to the ſeveral ſtatutes made and then in force concerning bankrupts which ſaid certificate was afterwards and before the return of any writ of *capias ad ſatiſfaciendum* againſt the ſaid *Robert Maclagan* upon the ſaid judgment in the ſaid declaration mentioned and alſo before the ſuing forth of the original writ of the ſaid Plaintiff againſt the ſaid Defendant to wit on &c. at &c. in due manner allowed and confirmed by the Lord High Chancellor of *Great Britain* according to the form of the Statute in ſuch caſe made and provided And that the ſaid commiſſion of bankrupt hereinbefore mentioned is ſtill in full force and that the cauſe of the ſaid action or ſuit in which ſuch judgment was ſo recovered as aforeſaid againſt the ſaid *Robert Maclagan* accrued before ſuch time as the ſaid *Robert Maclagan* ſo became a bankrupt as aforeſaid to wit at &c. And this &c. Wherefore &c. To this there was a ſpecial demurrer, aſſigning for cauſes "that the ſaid plea does not ſtate that the ſaid *Robert Maclagan* was a trader within any of the Statutes made concerning bankrupts And that the ſaid plea does not ſtate how or in what manner the ſaid *Robert Maclagan* became a bankrupt And that the ſaid plea does not ſtate that the ſaid *Robert Maclagan* owed any debt or debts upon which the ſaid commiſſion in the ſaid plea mentioned could legally have been awarded or iſſued And that the ſaid plea does not ſtate that the ſaid commiſſion was awarded or iſſued upon the petition of any perſon or perſons to whom the ſaid *Robert Maclagan* was indebted And that the ſaid

Donnelly v. Dunn.

plea is in other reſpects defective inſufficient and informal." Joinder in demurrer.

Le Blanc Serjt. in ſupport of the demurrer obſerved, 1ſt, That the bankruptcy and certificate of the principal were not uſually pleaded in diſcharge of bail, but that the Court exerciſed a ſummary (*a*) juriſdiction where the principal had obtained his certificate before the bail were fixed. 2dly, That the 5 *Geo.* 2. *c.* 30. gives the general plea of bankruptcy to the bankrupt only, and that in all other caſes bankruptcy muſt be pleaded in the ſame manner as was neceſſary before that Statute; he cited *Tully* v. *Sparkes and others*, 2 *Ld. Raym.* 1546. 2 *Str.* 869. S. C.

Marſhall Serjt. who was to have argued in ſupport of the plea, finding the opinion of the Court againſt him, moved for leave to amend, which was accordingly granted.

BULLER J. expreſſed a doubt whether the Defendant ſhould not have ſought relief by an application to the ſummary juriſdiction of the Court, inſtead of pleading the bankruptcy and certificate of the principal (*a*).

(*a*) Vid. *Woolley* v. *Cobbe*, 1 *Burr*. 244. and *Cockerill* v. *Owſton*, 1 *Burr*. 436.

(*b*) In the courſe of this term the following caſe was alſo decided:

Beddome and another v. *Holbrooke and another.*—*Scire facias* on a recognizance of bail. To this the Defendants pleaded "that *R. H.* (their principal) in the ſaid writs of *ſcire facias* and declaration thereon mentioned after the recovery of the ſaid judgment and before the iſſuing of the ſaid firſt *ſcire facias* and before any *capias ad ſatisfaciendum* ſued forth upon the judgment aforeſaid at the ſuit of them the ſaid Plaintiffs againſt the ſaid *R. H.* had been returned and filed to wit on &c. at &c. became a bankrupt within the true intent and meaning of the ſeveral Statutes made and now in force concerning bankrupts And that the ſaid *R. H.* having ſo become bankrupt as aforeſaid afterwards and before any ſuch writ of *capias ad ſatisfaciendum* was ſued forth at the ſuit of the ſaid Plaintiffs againſt the ſaid *R. H.* on the judgment aforeſaid to wit on &c. at &c. did duly obtain his certificate according to the form of the Statute in ſuch caſe made and provided And the ſame certificate was afterwards and before the return and filing of any ſuch *capias ad ſatisfaciendum* and alſo before the iſſuing of ſuch writ of *ſcire facias* as aforeſaid to wit on &c. at &c. duly allowed and confirmed according to the form of the Statute in ſuch caſe made and provided And this &c. Wherefore &c." The Plaintiffs put in a replication, to which there was a ſpecial demurrer.

Shepherd Serjt. was proceeding to argue in ſupport of the demurrer to the replication, but *Runnington* Serjt. on the other ſide referred the Court to the plea as radically bad.

Of this opinion were the Court. And

BULLER J. (*abſente* EYRE Ch. J.) ſaid, the plea is bad on every account. The general plea is only given to the bankrupt himſelf. And I am by no means ſatisfied, that the bankruptcy of the principal can be pleaded by the bail. It may afford ground for the Court to give relief on motion, but I do not ſee how it can be made a legal defence.

Judgment for the Plaintiff.

1799.
June 3d.

VAN BRAAM *v.* ISAACS.

If a bond and warrant of attorney given to ſecure an annuity, are no otherwiſe noticed in the memorial, than by way of recital in the annuity deed which is ſet out, it is not a ſufficient compliance with the 17 *Geo.* 3. *c.* 26. Nor can the Court refuſe to interfere on the ground of 18 years having elapſed ſince the grant, and the grantee being dead.

THIS was an application calling on the Plaintiff's executor to ſhew cauſe why a warrant of attorney given to ſecure an annuity ſhould not be delivered up to be cancelled, and the judgment entered thereon be ſet aſide. It was moved on two objections to the memorial, *viz.* 1ſt, That neither the warrant of attorney or the annuity bond was ſufficiently deſcribed: 2dly, That the names of the witneſſes to thoſe two inſtruments were not mentioned.

The memorial ſet out an indenture bearing date the 20th of *Auguſt* 1781 between the Plaintiff and Defendant, which indenture after reciting that the Defendant had executed a bond bearing even date with the ſaid indenture in the penal ſum of 1000 *l.* conditioned for the payment of an annuity of 100*l.* to the Plaintiff, and alſo that for the better ſecuring the ſaid annuity the Defendant had executed a warrant of attorney of the ſame date, proceeded to the grant of the annuity. The witneſſes to the indenture were regularly ſtated in the memorial, but no other notice was taken of the bond and warrant of attorney than what was introduced by the recital in the deed. The grantee was dead.

Marſhall Serjt. in the courſe of the laſt term ſhewed cauſe. The object of the act, as appears by the preamble, was to prevent ſecrecy in annuity tranſactions; and it was with that view that all the deeds were ordered to be memorialized, and all the witneſſes to be mentioned. The anſwer therefore to the firſt objection is, that the bond and warrant of attorney having been mentioned in the recital of the deed, the public is equally informed of all the ſecurities, as if a ſubſtantive allegation had been made of the bond and warrant of attorney. Mentioning the conſideration by way of recital has been held ſufficient. *Sowerby* v. *Harris*, 4 *Term Rep.* 494. and *Hodges* v. *Money and another*, 4 *Term Rep.* 500 (*a*). With reſpect to the ſecond objection, it is only neceſſary that the names of all the witneſſes ſhould appear on the face of the memorial. The reaſon is obvious; that every perſon intereſted may be able to get at all the evidence relative to the tranſaction. But it appears from the bond and warrant of attorney now in court, that the witneſſes to the indenture were alſo witneſſes to

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(*a*) *Vid. etiam Couſins* v. *Thompſon*, 6 *Term Rep.* 335.

thoſe inſtruments. Beſides, admitting the objections to be valid, the Court will not give them effect after the death of the grantee, and in a caſe where the annuity has ſtood eighteen years unimpeached (*a*).

Le Blanc Serjt. in ſupport of the rule. The Court has never refuſed to interfere on account of the death of the grantee, except in caſes where the application has been made on the ground of ſomething which paſſed at the time of granting the annuity, and which the grantee only could contradict; as where part of the conſideration-money has been retained or paid back: and with reſpect to the length of time which has elapſed ſince this annuity was granted, it is ſufficient to ſay that the grantee has enjoyed for eighteen years, an annuity for which he gave only five years purchaſe, and which he never ought to have enjoyed at all. This clearly is only a memorial of one deed inſtead of a memorial of "every deed" as required by the act. A mere recital in the indenture of a bond and warrant of attorney cannot be a ſufficient compliance with the act; ſince mention of thoſe inſtruments may have been introduced with a view to take a ſum of money under pretence of a charge for the deeds, and they may never have been executed. This caſe may be diſtinguiſhed from thoſe in which a recital of the conſideration has been held ſufficient; for if the whole conſideration recited be not actually paid, the annuity is void under the fourth ſection of the act. As to the ſecond defect, it cannot be cured by matter dehors. The memorial runs "which ſaid *indenture* is witneſſed by *A.* and *B.*" How then is the grantor or any other perſon intereſted given to underſtand that the other inſtruments referred to were witneſſed by the ſame perſons.

Eyre Ch. J. As at preſent adviſed I do not ſee how theſe objections can be got over. The caſes which have been cited in ſupport of this memorial only tend to eſtabliſh that a ſtatement by way of recital of the contents of a deed is ſufficient; for the conſideration is part of the contents of the deed. Perhaps there may be good ground to ſupport thoſe caſes. And yet it is apparent that the conſideration recited in the deed and the true conſideration may be very different things. The object of the 17 *Geo.* 3. *c.* 26. having been to give every opportunity of ſcruinizing annuity tranſactions, perhaps the better conſtruction would have been to have re-

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(*a*) Vid. *Symmonds* v. *Mortimer*, 5 *Term Rep.* 140. and *Withy* v. *Woolley*, 7 *Term Rep.* 540.

quired a poſitive allegation of the conſideration actually paid. However as the conſideration is always to be found in the body of the deed, it may have been reaſonable to hold that a memorial of the deed, ſhould be a memorial of the particular parts of the deed ſpecified. But how can that determination affect other inſtruments which are quite *dehors* the deed, and on what conſtruction are we to diſpenſe with the memorial of any deeds, when the Statute requires a memorial of every deed? Can it be ſaid that a memorial of one deed which recites other deeds to have exiſted is a memoral of every deed recited? If an act requires all the deeds of a mortgage to be inrolled, and the bond recites the indenture of mortgage, will it be contended that by the inrolment of ſuch a bond the law is ſatisfied? With regard to the names of the witneſſes the ſame difficulty occurs. If we could diſpenſe with a diſtinct memorial of the bond and warrant of attorney, we might be ſatisfied without a deſcription of the witneſſes to thoſe deeds: referring for the witneſſes to the principal deed. However I ſhould wiſh the Court to pauſe before it exerciſes a ſummary juriſdiction in the caſe of a grant made eighteen years ago; and in which the grantee is dead. This being an application to the general ſummary juriſdiction of the Court over all warrants of attorney, I ſee no reaſon why we ſhould not expect the ſame rules to be followed in this, as in other applications to our ſummary juriſdiction; we require them to be made in the firſt inſtance, and before the rights of parties are fixed and determined. There is a clauſe in the 17 *Geo.* 3. by which the Court is directed to interfere, but that relates to caſes of fraud, and there we are empowered to order the ſecurities to be delivered up to be cancelled. In this caſe if we act, it will be on our general juriſdiction, and not under the 17 *Geo.* 3.

BULLER J. The queſtion with reſpect to the diſcretion of the Court principally depends on the nature of the inſtrument. In this caſe if the Court do not interpoſe in the manner pointed out, I do not ſee how they can interpoſe at all. By the inſtrument which has been given the queſtion is concluded. And I apprehend that in all caſes where a party is precluded by a warrant of attorney from litigating a queſtion which ought to be tried, the Court will interfere. The words of the act give us no diſcretion.

HEATH J. Had this been a recent tranſaction I ſhould have had no doubt. The only queſtion is, whether the Court has

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VAN BRAAM *v.* ISAACS.

any diſcretion. With reſpect to the length of time which has clapſed, I think that there is a great difference between an annuity which is paid quarterly, and a debt of which the party never thinks till he is called upon to pay.

ROOKE J. I think the Court have no diſcretion, but are bound to ſet aſide the annuity.

Cur. adv. vult.

The caſe having ſtood over until this day, *Le Blanc* now mentioned it to the Court, and informed them, that in the courſe of laſt term and the preſent, two annuities granted by the ſame perſon had been ſet aſide in the Court of King's Bench notwithſtanding the ſame length of time had been ſuffered to elapſe.

On hearing this, the Court made

The rule abſolute.

June 3d.

ROBINSON *v.* SMYTH.

The Court will not put off a trial on account of the abſence of a material witneſs, if by his evidence the defence of ſlavery is intended to be eſtabliſhed.

SHEPHERD Serjt. moved to put off the trial in this caſe on account of the abſence of a material witneſs. He ſtated that the action was brought for wages ſuppoſed to be due to the Plaintiff as a ſeaman, upon a voyage from the *Weſt Indies* to *London*, and that the defence to be eſtabliſhed by the evidence of the abſent witneſs, was that the Plaintiff was ſlave to the Defendant who had paid a valuable conſideration for him.

Sed per Curiam. This is an odious defence, to which the Court will give no aſſiſtance. If the Defendant were to offer to put it on the record, we ſhould not give him a day's time. It is as much a denial of juſtice as the plea of alien enemy, which is always diſcouraged by the Court.

Shepherd took nothing by his motion.

1799.
June 3d.

SCUDAMORE and Others *v.* STRATTON and Others, Executors of T. ROTHLEY.

If a leaſe for 99 years determinable on 3 lives be conveyed in truſt for *A.* for life, and *A.* covenant to uſe his utmoſt endeavours, as often as any of the perſons on whoſe lives the premiſes are held, ſhall die, to renew the ſame by purchaſing of the lord of the fee a new life in the room of ſuch as ſhall fail, it is no breach of the covenant, if, upon one of the lives failing he procure a renewal upon his own life. Performance pleaded otherwiſe than in the terms of the covenant, is bad, even on general demurrer.

COVENANT. The declaration ſtated " that one *Margaret Gardner* was poſſeſſed of certain premiſes for the reſidue of a term of ninety-nine years determinable on the deaths of certain perſons then living, and being ſo poſſeſſed, by indenture dated the 7th of *September* 1770 between the ſaid *M. Gardner* of the firſt part *T. Rothley* of the ſecond part and the Plaintiffs of the third part reciting that *M. Gardner* was poſſeſſed of a leaſe of parcel of the ſaid premiſes determinable on the deaths of *Anne Foy* and *J. Chandler* and of a leaſe of certain other parts determinable on the deaths of *Anne Gardner* the ſaid *M. Gardner* and *Seymour Love* that a marriage was agreed upon between the ſaid *M. Gardner* and *T. Rothley* and that the ſaid leaſes ſhould be aſſigned to truſtees upon truſt, it was witneſſed that the ſaid *M. Gardner* with the conſent of *T. Rothley* aſſigned the ſaid leaſes to the Plaintiffs in truſt among other things for the ſaid *T. Rothley* for his life; that *T. Rothley* covenanted with the Plaintiffs that as often as any of the perſons on whoſe lives the premiſes were then held or ſhould be held from the time being ſhould die, he would forthwith uſe his utmoſt endeavours to renew the ſame premiſes reſpectively with the lords of the fees thereof by purchaſing of them new lives or a new life therein reſpectively and ſuch further terms eſtates and intereſt therein as before mentioned determinable on ſome other new lives or a new life in the room of ſuch lives or life as ſhould ſo happen to die as aforeſaid, and to procure new leaſes to be granted thereof by the ſaid lords reſpectively to the ſaid Plaintiffs upon the truſts in the indenture mentioned and that he would pay the fines or conſideration money of the renewals and the expences of the leaſes and other charges; that the marriage took effect; that *M. Rothley* formerly *M. Gardner* died in 1772 and that *T. Rothley* ſurvived her." Firſt breach " that the ſaid *T. Rothley* did not after the death of the ſaid *M. Rothley* his wife ſhe being one of the perſons on whoſe lives the premiſes were held forthwith and as ſoon as he reaſonably might and ought to have done or at any time afterwards uſe his utmoſt or any endeavours to renew the ſame premiſes reſpectively with the lords of the fees thereof by purchaſing of them a new life therein reſpectively or ſuch further terms eſtates and intereſts as in the indenture mentioned determinable on ſome other new life in the room of the ſaid *M. Rothley* his wife ſo deceaſed as aforeſaid and procure new leaſes to be granted thereof by the ſaid lords to the Plaintiffs upon the truſts in the indenture mentioned, although he might and could have renewed *&c.* and procure new leaſes *&c.* but neglected *&c.*" On the 2d, 3d, and 4th breaches iſſues were joined. Fifth breach "that during the life of *T. Rothley*, *M. Rothley Anne Gardner J. Chandler* and *S. Love* died, yet *T. Rothley* did not after the deaths of them or any of them they being perſons on whoſe lives the premiſes were held uſe his utmoſt endeavours to renew the premiſes by purchaſing new lives *&c.* in the room of the ſaid *M. Rothley Anne Gardner J. Chandler* and *S. Love* according to the form and effect of his covenant although in his lifetime he might and could have ſo done, but on the contrary on the death of *T. Rothley* there remained and was one life and no more, for and during which was held any term eſtate or intereſt whatſoever in the ſaid premiſes, contrary to the form and effect of the covenant *&c.*

Pleas. To the 1ſt breach, "That *T. Rothley* did forthwith and as ſoon after the death of *M. Rothley* his wife as he reaſonably could or ought to have done to wit on *&c.* uſe his utmoſt endeavours to renew the ſaid premiſes reſpectively with the lords of the fees thereof, and did actually renew the ſame by purchaſing a new life, *that is to ſay the life of himſelf the ſaid* T. Rothley *therein in the room of the life of the ſaid* M. Rothley *his wife*, and although *T. Rothley* in his lifetime did not thereupon procure new leaſes to be granted to the plaintiffs, but procured them to be granted to himſelf, yet that the Defendants as his executors after his death offered to aſſign the leaſes to the Plaintiffs, but that the Plaintiffs refuſed to accept them or any aſſignment of them, and that the Defendants are ſtill ready and willing to aſſign them *&c.* And this *&c.* Wherefore *&c.*" To the 5th breach, "That *T. Rothley* did forthwith and as ſoon after the death of *M. Rothley* his wife as he reaſonably could or ought to have done to wit on *&c.* uſe his utmoſt endeavours to renew the ſaid premiſes reſpectively with the lords of the fees thereof and did actually renew the ſame by purchaſing a new life that is to ſay the life of the ſaid *T. Rothley* therein in the room of the life of the ſaid *M. Rothley* his wife, and that the ſaid

T. Rothley in his lifetime forthwith and as ſoon after the death of the ſaid *Anne Gardner* &c. did uſe his utmoſt endeavours *&c.* and did renew by purchaſing a new life that is to ſay the life of one *W. Haynes* in the room of the life of the ſaid *Anne Gardner*. And that the ſaid *T. Rothley* in his lifetime forthwith and as ſoon after the deaths of the ſaid *J. Chandler* and *S. Love* &c. did uſe his utmoſt endeavours to renew the ſaid premiſes held during the lives of the ſaid *J. Chandler* and *S. Love* with the lords of the fees thereof, and did make application to the ſaid lords to permit him to renew the ſaid premiſes by purchaſing of them new lives reſpectively, or ſuch further terms eſtates and intereſt therein as in the ſaid indenture mentioned determinable on ſome other new lives, in the room of the ſaid *J. Chandler* and *S. Love*; but the ſaid lords wholly refuſed to permit the ſaid *T. Rothley* to renew the ſame by purchaſing any new life or lives or any further term eſtate or intereſt in the premiſes, and from thence continually till the death of the ſaid *T. Rothley* did refuſe ſo to do Wherefore on the death of the ſaid *T. Rothley* there remained and was one life and no more for and during which was held any term eſtate or intereſt in any of the premiſes aforeſaid And this *&c.* Wherefore *&c.*

To theſe two pleas there were general demurrers, and joinders therein.

Shepherd Serjt. in ſupport of the demurrer to the 1ſt plea contended, that according to the ſpirit of the covenant *T. Rothley* was bound to leave the eſtate at his death in as good a condition as he received it, *viz.* with three *ceſtuy que vies* living; that a covenant to renew as often as any of the perſons on whoſe lives the premiſes were held ſhould die, there being three ſuch perſons, amounted to a covenant to keep up three lives: and that *T. Rothley* by having put in his own life in the room of that of his wife, had left the eſtate at the time of his death in the ſame ſituation as if he had not renewed at all. He referred to *Cooke* v. *Booth*, *Cowp.* 819. to ſhew that the Court would extend covenants for renewal beyond the ſtrict letter of the covenants if it appeared conſiſtent with the intention of the parties. He added, that no offer by the Defendants as executors of *T. Rothley* to aſſign the leaſes made out to him, which ought to have been made out to the Plaintiffs, could be deemed a performance of *T. Rothley's* covenant.

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The Court, after inquiring if there was any authority to ſhew that under ſuch a covenant as the preſent a party is reſtricted from putting in his own life, and no ſuch caſe being produced, ſaid; As it was in the power of the parties to provide againſt what has been done by inſerting a covenant, that *T. Rothley* ſhould leave the eſtate with as many lives as he received it, and they omitted to do ſo, there was fair ground for *T. Rothley* to put in his own life, that he might avoid the burden of again renewing on the death of the perſon he ſhould put in. It was natural for *T. Rothley* who had the beneficial intereſt to renew with his own life; and to conſtrue the covenant in the way contended for by the Plaintiffs, would be introducing a reſtriction which the parties themſelves did not conceive neceſſary. However as it is very clear that the Defendants' offer to aſſign the leaſes does not amount to a performance of *T. Rothley*'s covenant, there muſt be judgment for the Plaintiff.

Le Blanc Serjt. who was for the Defendants, inſiſted, that they were entitled to judgment on the 2d plea, the only remaining objection to which was, that it did not aver performance in the terms of the covenant, which being a point of form could not be taken advantage of on a general demurrer.

But *The Court* were of opinion that the omiſſion was matter of ſubſtance.

Judgment for the Plaintiff.

June 3d.

WYBURD *v.* TUCK.
Idem *v.* DYSON.
Idem *v.* SMITH.
Idem *v.* HOLBROOK.

If a compoſition for tithes is made by *A.* as proprietor and he leaſe them to *B.*, whoſe intereſt is afterwards put an end to by *A.* before any alteration is made in the compoſition, *A.* cannot determine it without a ſix months notice.

If *A.* execute a leaſe of tithes to *B.* on a day ſubſequent to their ſeverance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on 2 & 3 *Ed.* 6. *c.* 13., as the right to the tithe veſted in *A.* immediately on ſeverance.

Evidence that the pariſhioners have treated with the proprietor for a compoſition is not alone ſufficient to eſtabliſh his poſſeſſion of the tithes in an action on the Statute.

Quære, Whether if one only of two joint-tenants execute an aſſignment of a leaſe of tithes, the perſon claiming under that leaſe can ſupport an action for not ſetting them out?

DEBT for not ſetting out tithes under the 2 & 3 *Ed.* 6. *c.* 13. Plea, General iſſue.

At the trial of theſe four actions before EYRE Ch. J., the evidence on which ſeveral objections to the Plaintiff's recovery were founded, and which were reſerved by the Lord Chief Juſtice for the opinion of the Court, was as follows.

The anceſtors of the late *Stephen Jermyn* having been leſſees under the Dean and Chapter of *Saint Paul*'s of the tithes of the pariſh of *Tottenham*, about ſixty years ago leaſed them to one *Howard*, who held them for thirty years. On the 28th of *October* 1747 *Stephen Jermyn* was found lunatic; after which one *Lambly* became leſſee under him, and on 30th *April* 1781 obtained a new leaſe for ſeven years from *Edward Tyſon* the then committee of *Stephen Jermyn*, after the expiration of which he held over until the year 1798. In *March* 1796 *Stephen Jermyn* died, upon which *Harriet Eyre* and *Margaret Udney* the next of kin took out adminiſtration. In *May* 1796 the Dean and Chapter of *Saint Paul*'s granted a new leaſe of the tithes to *Harriet Eyre* and *Margaret Udney* for twenty-one years on their ſurrender of the old one. From them *Lambly* received notice, dated the 30th *September* 1797, to quit at *Lady-day* 1798, with which he complied, and an aſſignment of their leaſe was executed to one *Sperling* on 7th *December* 1797. *Sperling* executed a leaſe of the tithes to the preſent Plaintiff, dated the 15th *June* 1798, to hold the ſame for ſeven years from the 25th *March* preceding.

During all the time that *Howard* and *Lambly* were tenants to the *Jermyn* family the ſame compoſition was paid to them by the occupiers of lands in the pariſh, and *Lambly* was expreſsly forbid by thoſe under whom he held to make any alteration therein. *Sperling* having determined to raiſe the compoſition, gave a general notice to the pariſh in *March* 1798 that he was willing to treat with the landholders. In conſequence of this a meeting was held by them, at which the terms propoſed by *Sperling* were not acceded to.

In the caſe of *Smith*, that which was the ſubject of tithe was ſevered before, though not carried away until after the execution of the leaſe to him. The caſe of *Tuck* the firſt Defendant was alſo differed from the others by the circumſtance of the Plaintiff's failing to prove the execution of the aſſignment to *Sperling* by *Harriet Eyre* jointly with *Margaret Udney;* and it appeared that *Tuck* was not preſent at the meeting of the pariſhioners. Upon the whole therefore the objections as applying in the different caſes, were; 1ſt, That as the Plaintiff claimed under *Sperling*, to whom the aſſignment of the leaſe from the Dean and Chapter of *Saint Paul*'s had been executed by *Margaret Udney* only, he had

not

not ſhewn a good title to ſupport the action. 2dly, That a ſufficient notice to determine the compoſition had not been given to the Defendants. 3dly, That the Plaintiff was not entitled to recover, as the tithe veſted in *Spurling* immediately on ſeverance.

A rule *Niſi* having been obtained for ſetting aſide the ſeveral verdicts which had been found for the Plaintiff, and entering nonſuits in all the cauſes,

Shepherd Serjt. now ſhewed cauſe. In anſwer to the firſt objection, it may be contended that this action being founded on a tort, it is not neceſſary for the Plaintiff to make out his title, but that he may recover if he merely ſhew poſſeſſion. It was ſo held in *Wheeler* v. *Heydon*, *Cro. Jac.* 328. In *March* 1798, *Sperling* gave notice to the pariſhioners, that he was willing to enter into a compoſition for tithes, in conſequence of which a meeting was held, and at that meeting the only queſtion in diſpute was the amount of the compoſition to be paid; the right to the tithes was acknowledged to be in *Sperling*. Both in *Selwyn* v. *Baldy*, and *Hartridge* v. *Gibbs*, *Suſſex* Aſſizes 1682, *Bull. N. P.* 188. edit. 2. it was holden ſufficient by *Pemberton* Ch. J. for the Plaintiffs in actions on the Statute of *Edw.* 6. to prove their receipt of tithes from the other farmers in the pariſh in order to entitle them to recover againſt the Defendants. Proof of an agreement to pay a compoſition comes within the ſame principle. As to the ſecond objection, it is to be obſerved that the caſe of *Hewitt and others* v. *Adams*, *Dom. Proc.* *April* 19th, 1782 (*a*), by which the neceſſity of a ſix months' notice to determine a compoſition of tithes was eſtabliſhed, proceeded on the analogy between the occupiers of lands paying a compoſition, and tenants of lands holding from year to year. Now if *A.* let lands to *B.* for a term of years, and *B.* underlet to *C.* from year to year, *A.* will be entitled to enter upon the lands at the expiration of *B.*'s term without giving notice to *C.* So if *A.* let lands to *B.* at *Michaelmas* to hold from year to year, and *B.* underlet the ſame to *C.* at *Lady-day* to hold in the ſame manner, it will be ſufficient if *A.* give notice to *B.* at *Lady-day* to quit at the *Michaelmas* following, without regarding the ſub-contract between him and *C.* In the preſent caſe *Lambly* is to be conſidered as tenant to the *Jermyn* family from year to year, and the occupiers of the lands from whom he received the compoſition as his undertenants holding in the ſame manner.

(*a*) Vid. *Rayner on Tithes* 992.

The notice therefore which was given to *Lambly* by the repreſentatives of *Stephen Jermyn* muſt be ſufficient to entitle them, and thoſe who claim under them, to take the tithes in kind of the occupier of the lands. If this be not ſo, and the compoſition taken by *Lambly* is to bind the *Jermyns* or thoſe who claim under them, it may equally be contended that it ſhall bind the Dean and Chapter of *Saint Paul's* who were the original leſſors. With regard to the third objection, the words of the Statute are, that no perſon ſhall " take or carry away any ſuch or like tithes *&c*, under the pain of forfeiture of treble value of the tithes ſo taken or carried away." The right of action therefore does not accrue until the tithes have been carried away: and though the tithes in queſtion may have veſted in *Sperling* upon ſeverance, yet the leaſe to *Wyburd* was executed previous to the time when they were carried away; by that leaſe all the tithes in the pariſh of *Tottenham* to which *Sperling* was entitled, in which muſt be included the tithes in queſtion, veſted in *Wyburd*; conſequently the latter was entitled to thoſe tithes at the time when the wrong was committed. If however it ſhould be thought upon general grounds that a leaſe of tithes will not convey ſuch tithes as are actually ſevered at the time of its execution, it will be ſufficient in this caſe to advert to the *habendum* by which the leaſe is made to take effect from the 25th day of *March* preceding the date.

Le Blanc Serjt. *contrà*. Firſt, Admitting that it would be ſufficient for the Plaintiff to have proved peaceable enjoyment of the tithes without eſtabliſhing any other title, yet it was not in his power to ſupport his claim by evidence of enjoyment, ſince *Sperling* had never received any tithes, or come to any compoſition. Secondly, A certain compoſition having exiſted in the pariſh of *Tottenham* without alteration, as far back as the evidence went, the Court will infer that it was made not by *Lambly* but by the Dean and Chapter of *Saint Paul's*, or by the *Jermyn* family from whom the Plaintiff derives his title. Now if a rector having made a compoſition leaſe tithes, and the leſſee make no alteration in the compoſition, when the tithes revert to the rector the occupiers of land will continue to hold under the compoſition originally made by the rector, and conſequently will be entitled to notice before he can take the tithes in kind. The rules reſpecting notice to determine a compoſition are governed by the analogy to the notice to quit. Thus if the *Jermyns*, having let land to *A*. from *Michaelmas* to *Michaelmas*, had granted a leaſe at *Lady-day* to

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to *B.* for a term of years and *A.* had continued to pay rent to *B.* till the expiration of his term, *A.* would again be tenant from year to year to the *Jermyns*, and would be entitled to notice ſix months before *Michaelmas.* For though *B.* might have put an end to the tenancy during his term, yet not having done ſo, it continues as at firſt created: if it were not ſo, that which was originally taken as a tenancy from year to year beginning at *Michaelmas*, would be put an end to at *Lady-day.* The caſe of *Hewitt and others* v. *Adams* is deciſive of this point. Thirdly, The Statute of *Edw.* 6. being made for the protection of perſons in poſſeſſion of tithes, the Plaintiff cannot maintain this action againſt the Defendant *Smith.* Immediately on ſeverance the right to the tithes veſted in *Sperling*, and *Smith* could only have juſtified carrying them away under a compoſition from him. If *Sperling* had been a ſpiritual rector inſtead of a law impropriator, and had died after the ſeverance of theſe tithes, they would have paſſed to his executors, and not to his ſucceſſor; *Sperling* therefore was the perſon injured by the tithes being carried away. The *habendum* in the leaſe being from the 25th of *March*, has reference to nothing but the period from which the grantee is to hold, in order to aſcertain the time when the leaſe is to expire, *viz.* in ſeven years from the 25th of *March.* If it were held to veſt any title previous to the execution of the leaſe, it might be ſo framed that a leaſe for twenty-one years ſhould give a right to tithes accrued fourteen years before.

Eyre Ch. J. On the firſt of the objections raiſed, and which applies to the caſe of *Tuck*, I have no difficulty, being of opinion that the verdict muſt be ſet aſide and a nonſuit be entered on the ground of the Plaintiff's having failed to make out his title, and not having proved himſelf to be in poſſeſſion of the tithes. It was admitted on his part, that he muſt at leaſt ſhew himſelf to be in poſſeſſion; and I am not prepared to agree that becauſe poſſeſſion unaccompanied with other circumſtances will be a ſufficient title, that therefore poſſeſſion traced back by the Plaintiff himſelf to that which turned out to be no title, will equally avail. The caſe is altered where the Plaintiff proves his own bad title and thereby ſhews that to be a wrongful poſſeſſion, which would otherwiſe have been good *primâ facie* evidence to ſupport his claim. However I only mean to ſtate my difficulty on that point, not to give a preciſe opinion upon it, as the caſe cited from *Croke* ſeems to eſtabliſh a contrary doctrine. But I am of opinion that this Plaintiff was not in poſſeſſion, holding as I do that nothing will

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place a man in poſſeſſion but a good title, which will draw to it the poſſeſſion, or the actual receipt of tithes, or that which is equivalent to receipt of tithes, *viz.* a compoſition. My Brother *Shepherd* argued, that the receipt of tithes, like the receipt of rent and profits, amounted to poſſeſſion. Actual uſe and enjoyment does ſo I admit; but he was obliged to contend from thence that an agreement for a compoſition was equal to a receipt, and then to go one ſtep further, and inſiſt that a converſation tending towards an agreement though it ended in a diſagreement was equal in effect to an agreement. By this chain of reaſoning he endeavoured to prove that the Plaintiff was in poſſeſſion. His title however muſt depend upon his having or not having a leaſe; here he had only a leaſe for a moiety and therefore was not in poſſeſſion and cannot maintain this action.

With regard to the queſtion of notice, which applies to all theſe cauſes, I have the more difficulty in ſpeaking upon it, as I feel myſelf under the dominion of old prejudices. The judgment of the Houſe of Lords which has been alluded to, was a reverſal of a judgment given by the Court of Exchequer, and in which I concurred. I am to preſume that the judgment of the Houſe of Lords was right, but I am not maſter of the principles on which it proceeded. Tithes cannot in my opinion be well compared to land for any purpoſe, but particularly for the purpoſe of connecting a compoſition with the inheritance. It appears to me that the doctrine of binding the landlord by the intereſt of the tenant from year to year was founded on the diſtribution of land into a variety of intereſts, as that of the tenant and the reverſioner, whereas it will not be found to apply to tithes ſo diſtinctly as to juſtify our adopting the ſame rules as are capable of being adopted with reſpect to land. In the caſe of *Hewitt and others* v. *Adams* the Defendants inſiſted in the Exchequer that they were not at all bound to pay the tithes demanded, and we thought that where a Defendant claims to withhold tithe adverſely, all idea of compoſition muſt be put out of the caſe. The analogy between land and tithe does not appear ſatisfactory to me. Land is either taken on a holding from *Lady-day*, or from *Michaelmas*, or from ſome other time, and then notice to quit muſt be given accordingly. But if a compoſition is to be determined on any juſt principles, the notice muſt be given from a period ſuitable to the nature of the tithes, and with a relation to the manure and cultivation of the

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land. There muſt be ſuch a rule as will enable the tenant to cultivate his land in the manner moſt beneficial to himſelf accordingly as he is to pay a compoſition or to pay in kind. I have great difficulty therefore in underſtanding on what ground a notice is neceſſary in the caſe of tithes, and I cannot at all comprehend how the owners of the land can be conſidered parties to, a compoſition made with the occupiers of the land. Tithe in kind is the thing demiſed; the compoſition therefore begins with the intereſt of the tenant, is governed by that intereſt and muſt I ſhould think end with it. It has been argued that there may be a connection between the title of inheritance to the tithes and the compoſition; if there can be, I ſubmit; it may be a neceſſary conſequence of that judgment, the principles of which I do not underſtand. As ſome of my Brothers concurred in that judgment, they will probably ſtate on what ground it is, that a compoſition may be extended to the caſe of a new tenant, claiming on the determination of the intereſt of a former tenant.

On the laſt point there can be no doubt. The *habendum* of the Plaintiff's leaſe can only be conſidered as marking the duration of his intereſt, and its operation as a grant is merely proſpective. That leaſe only veſted in the Plaintiff a right to the tithe which ſhould accrue from the time of the grant. Now the title to the tithe in queſtion aroſe immediately on the ſeverance of the tithable matter from the land. Is it not clear that if a rector dies after the ſeverance of the tithe and before its ſeparation, and a new rector comes in, that the right to the tithe is in the old rector? The law gives to the new rector in that caſe all that the grant gave to the new leſſee in this. *Sperling* therefore being entitled to theſe tithes at the time of the ſeverance and the perſon to complain if they were carried away, this Plaintiff has no ground of action againſt *Smith* in that view of the caſe.

BULLER J. My opinion will be principally founded on the two laſt points. On the firſt my mind ſtill fluctuates. It has been contended that for want of evidence to eſtabliſh the joint execution of the deed of aſſignment by the two perſons who took out adminiſtration, the Plaintiff cannot recover againſt *Tuck*. But this is the caſe of a tort, and I am not quite ſatisfied that in ſuch a caſe, if the Plaintiff declare as ſolely entitled and prove himſelf to be entitled to a moiety only, he may not recover for that moiety. It was ſo held in the caſe of *Nelthorpe and Farrington* v.

Dorrington, 2 *Lev.* 113. However, were I to rely on this point much, I ſhould wiſh for further conſideration, before I came to any concluſion (*a*).

The ſecond point appears to me to have been fully ſettled by the deciſion in the Houſe of Lords. That deciſion was, that the ſame notice muſt be given to determine a compoſition, as muſt be given to a tenant of land holding from year to year. The other point alluded to by my Lord Chief Juſtice was alſo raiſed in that caſe. The landholders contended in the firſt place, that they were not obliged to pay the tithe claimed; and 2dly, that if they were, the Plaintiff was not entitled to recover becauſe there had been a previous compoſition, the notice to determine which was not ſufficient. There was a doubt on the Woolſack at that time whether both or only one or which of theſe queſtions ſhould be put to the Judges. At laſt the queſtion put was whether the notice given was ſufficient to determine the compoſition, and the Judges were unanimouſly of opinion that it was not, and ſaid expreſsly that a notice to determine a compoſition for tithe ought to be given with analogy to the notice given in a holding of land. By that deciſion we are bound; nor do I think any of the difficulties it has been ſuppoſed likely to produce will ever occur. It has been argued that if the Plaintiff, as deriving title from the *Jermyn* family, is bound by this compoſition, the *Dean and Chapter of St. Paul*'s will alſo be bound by it. That concluſion however is queſtionable and may or may not be true according to the circumſtances. If the intereſt of the leſſee under the *Dean and Chapter* with whom the compoſition was made expire, the *Dean and Chapter* will not be bound. But if a leaſe be granted for a long term of years and the *Dean and Chapter* take an aſſignment of it, though as to many purpoſes that will operate as a ſurrender, yet with regard to the intereſt of third perſons it will not. All depends on the ſingle queſtion whether there be a continuance of that intereſt under which the compoſition was firſt created? If that continues, the compoſition continues; if that be at an end, the compoſition is at an end alſo. It has been ſaid that there may be a difference between a compoſition with the owner and a compoſition with the occupier of the land. If however the intereſt of the occupier ceaſe, the compoſition made with him, unleſs under particular circumſtances, will be at an end. But no queſtion of

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(*a*) *Vide Scott* v. *Godwin, ante*, p. 67. and the caſes cited therein.

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that kind ariſes here, for it does not appear but that the occupiers in all the ſtages of the caſe were the ſame. The difficulty would be if we were to ſuppoſe a compoſition to take place from *Michaelmas* with a tenant who is in on a *Lady-day* bargain. In that caſe the compoſition would be either during the intereſt of the tenant or from year to year generally. If the former, notice muſt be given for *Lady-day*; if the latter, a queſtion might be raiſed whether the compoſition ſhould not continue to the end of the year, though the intereſt of the tenant ceaſed on the expiration of his leaſe. That may be a nice queſtion, but it does not ariſe in this caſe. There may be difficulties in point of convenience as to the time at which a compoſition ſhall commence, but thoſe difficulties are for the conſideration of the parties when they make their agreement. On the facts of the preſent caſe the compoſition muſt be taken to be continuing, inaſmuch as the Plaintiff claims under thoſe perſons with whom it appears to have been made.

The laſt point has been fully and ably ſtated by my Lord Chief Juſtice, and I entirely concur with him.

HEATH J. The objection to the Plaintiff's recovery, that there was no notice to determine the compoſition, muſt prevail, becauſe the title under which he claims is derived from *Sperling*, in whoſe time the compoſition exiſted and has not been diſſolved by the parties. In the Houſe of Lords the analogy between land and tithes was conſidered, and the opinion of the Judges was founded on the inconvenience which the occupiers of lands muſt ſuſtain, if a compoſition could be put an end to without notice. It was conſidered that by notice they would be enabled to cultivate their lands in ſuch a way as would beſt anſwer to them when called upon to pay tithes in kind, and that it would be very unjuſt to deprive them of this advantage. As to the queſtion whether this Plaintiff can recover when one only of two joint-tenants has executed the leaſe, I wiſh to give no opinion, as my Brother *Buller* has cited a caſe in favour of the Plaintiff.

ROOKE J. It appears from the facts of this caſe that as far back as the evidence went, tithes had never been ſet out in the pariſh of *Tottenham*. It is to be wiſhed therefore that theſe Defendants ſhould not be liable to actions for not doing that which never appears to have been done within the pariſh: and in point of law I think that they are not liable. As the leſſees of the tithes under the *Jermyn* family were deſired by them not to raiſe the compoſition, it muſt be conſidered as having been made with that family. Now Mrs. *Eyre* and Mrs. *Udney* being the repreſentatives of that family, may by implication be conſidered as having alſo deſired that the compoſition ſhould not be raiſed. And though they might have retracted the intimation originally given, yet not having done ſo, the compoſition muſt remain in force till notice be given to the landholders of an intention to put an end to it. The occupier may be induced by notice to alter the courſe of huſbandry, and it would be hard to make him liable in a penal action where that notice has been withheld. On the principles of the deciſion in the Houſe of Lords, and on the general juſtice of the caſe, I think a nonſuit ſhould be entered.

With reſpect to the objection, that the aſſignment of the leaſe was executed by one only of two joint-tenants, it ſtrikes me that it would be hard to allow the law as laid down in the caſe in *Levinz* to prevail: ſince it would be calling on the Defendant to plead in abatement, or be liable to two more actions.

On the third point I entirely concur with the reſt of the Court: the right to the tithes accrued immediately on ſeverance, and at the time when the leaſe was executed there was nothing but a poſſibility of action in caſe they ſhould not be ſet forth, which poſſibility could not be aſſigned.

Rule abſolute.

JELFS *v.* BALLARD.

June 10th.

An action againſt a bankrupt, who has obtained his certificate under a ſecond commiſſion, on a cauſe of action accruing previous to his ſecond bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 *Geo.* 2. *c.* 30. *ſ.* 37. is elapſed, if evidence be adduced to ſhew that it is not probable from the ſtate of the effects in the hands of the aſſignees that the bankrupt will be able to pay 15*s.* in the pound.

INDEBITATUS *Aſſumpſit*. Plea. Bankruptcy and certificate.

This cauſe came on before *Buller* J. at the *Weſtminſter* Sittings in this term, when it appeared that the Defendant had formerly been a bankrupt and obtained his certificate; that a ſecond commiſſion iſſued againſt him on the 13th of *April* 1798, under which he alſo obtained his certificate; that the cauſe of action accrued previous to the ſecond bankruptcy, but that under his laſt commiſſion no dividend had as yet been declared. This laſt fact was proved by one of the aſſignees to the commiſſion, who was called by the Plaintiff, and who ſtated that the debts proved

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under the commiſſion amounted to 1100*l.*; that effects of the bankrupt had been ſold for 480*l.*, and that there was alſo a freehold eſtate, but from the incumbrances upon it he did not think it was of any value, and was upon the whole of opinion that the bankrupt would not pay 15*s.* in the pound; but that no dividend had been made. The jury found a verdict for the Plaintiff.

Sellon Serjt. now moved for a rule *Niſi* for ſetting aſide this verdict and entering a nonſuit; and contended, 1ſt, that the Defendants not having paid 15*s.* in the pound under his ſecond commiſſion, being the only ground on which the Plaintiff could ſupport his action, it lay upon him to prove that fact and thereby deprive the Defendant of the benefit of his certificate, and cited *Gill* v. *Scrivens*, 7 *Term Rep.* 27. where it was held neceſſary to aver it in a *Scire Facias*. 2dly, That the evidence which was produced to ſhew that the Defendant had not paid 15*s.* in the pound was not ſufficient, but on the contrary proved that this action was commenced prematurely, ſubmitting that as there were ſtill effects in the hands of the aſſignees, and the amount of the property undiſpoſed of was uncertain, the action ought not to have been brought until a dividend had been made; that by 5 *Geo.* 2. *c.* 30. *ſ.* 37. the aſſignees are directed to make the ſecond dividend in eighteen months, whereas in this caſe the period allowed by the act had not elapſed, and therefore till that time it could not be aſcertained whether the bankrupt would pay 15*s.* in the pound or not. He admitted that if it had been proved that the bankrupt's eſtate was ſo inſolvent as to allow of no dividend, the action might in that caſe have been ſupported.

BULLER J. (*abſente* EYRE Ch. J.) The caſe referred to as decided in the King's Bench is good law; but that caſe does not ſhew on whom the proof of non-payment of the 15*s.* in the pound lies. The Plaintiff muſt ſtate in his *Scire Facias* every thing that entitles him to recover; but it is a very different queſtion what is to be proved by one party and what by the other. But ſuppoſing the *onus probandi* to lie on the Plaintiff, ſtill the evidence which was given was at leaſt preſumptive evidence that the bankrupt will not pay 15*s.* in the pound, and not having been contradicted by the Defendant it muſt be held concluſive.

HEATH J. It is a common thing in actions on the game-laws for the Plaintiff in his declaration to negative all the qualifications, which would exempt the Defendant from the penalties of thoſe laws, but it lies on the Defendant to prove that he comes within any of them. The payment of 15*s.* in the pound is the condition of the bankrupt's diſcharge.

ROOKE J. Of the ſame opinion.

Sellon took nothing by his motion.

ELLIS and Wife, Executor and Executrix, *v.* GOVEY Executor.

June 11th.

A replication taking iſſue on a plea of payment to debt on an annuity-bond muſt be ſigned by a Serjeant.

DEBT on bond conditioned for the payment of an annuity to *M. Shurmer* deceaſed, during her life. Pleas: 1ſt, Payment of the annuity to *M. Shurmer* up to the time of her death; 2dly, Payment of all arrears of the annuity due in the lifetime of *M. Shurmer* to the Plaintiffs ſince her death. The Plaintiffs, after proteſting in their replication againſt the payments as alleged in the pleas, averred twenty years arrears, amounting to 80*l.*, to be due and unpaid, and concluded to the country. This replication having been put in without the ſignature of a Serjeant, judgment of *Nonpros* was ſigned. To ſet aſide this judgment for irregularity a rule *Niſi* was obtained on a former day, and *Shepherd* Serjt. in ſupport of that rule now cited *Hubert* v. *Ld. Weymouth*, 2 *Bl.* 816. where it was held that a replication of *Nul tiel record* need not be ſigned by a Serjeant, notwithſtanding the caſe of *Simpſon* v. *Neale*, 2 *Wilſ.* 74. in which a contrary rule had been laid down.

Cockell Serjt. *contrà*, was ſtopped by *the Court* who (*abſente* EYRE Ch. J.) ſaid; This point muſt be governed by the practice of the Court; and indeed as far as reaſon is concerned it ſeems right that this replication ſhould be ſigned. Much may depend on the manner of taking iſſue; it is material that it ſhould be ſo taken as to decide the merits. Where the plea is ſigned by a Serjeant, the replication ſhould be ſigned alſo; to this rule a *ſimiliter* is an exception, for no judgment is required in merely joining iſſue.

However on payment of coſts *the Court* made

The rule abſolute.

In this term Mr. Juſtice ASHHURST having reſigned his ſeat in the Court of King's Bench, was ſucceeded therein by SIMON LE BLANC Eſq. one of his Majeſty's Serjeants at Law, who was knighted.

On the laſt day of this term JOHN LENS of *Lincoln's-Inn* and JOHN BAYLEY of the *Middle-Temple*, Eſquires, were called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"*Libertas ſub rege pio.*"

END OF TRINITY TERM.

Shortly after the cloſe of this term, at *Ruſcombe* his ſeat in *Berkſhire*, died, Sir *James Eyre* Knight, Lord Chief Juſtice of this court. *De cujus laude, neque hic locus eſt ut multa dicantur, neque plura tamen dici poſſunt quam populus Romanus memoriâ retinet.*

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CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER;

AND

In the HOUSE OF LORDS

IN

Eaſter Term,

In the Thirty-ſixth Year of the Reign of GEORGE III.

The following caſes now preſented to the public, as a concluſion to the Firſt Volume of theſe Reports, were determined in the year which intervened between the completion of Mr. H. Blackſtone's Reports, and the commencement of this work. The Reporters having been favored with the notes taken during that period by Mr. A. Moore with a view to publication, have beſtowed their utmoſt attention in digeſting and arranging them; conſcious at the ſame time how much better the taſk might have been performed by the ſame hand by which it was begun.

(In the *Exchequer-Chamber.*)

TARLETON and Others *v.* STANIFORTH and Others; In Error.

April 20th.

JUDGMENT in this caſe having been given for the Defendant in the Court of *King's Bench*, (See 5 *Term Rep.* 695.) the Plaintiffs brought their writ of error in this court.

In a policy of inſurance againſt loſs by fire from half a year to half a year, the aſſured agreed to pay the premium half yearly, "as long as the inſurers ſhould agree to accept the ſame" within 15 days after the expiration of the former half year; and it was alſo ſtipulated that no inſurance ſhould take place till the premium was actually paid; a loſs happened within 15 days after the end of one half year, but before the premium for the next was paid; held that the inſurers were not liable though the aſſured tendered the premium before the end of the 15 days, but after the loſs.

Tarleton *v.* Staniforth.

The caſe was argued this day by *Chambre* for the Plaintiffs in error, and *Wood* for the Defendants, when the judgment of the *King's Bench* was affirmed.

(In the *Exchequer-Chamber.*)

April 20th.

Turner and Others *v.* Hawkins and Others; In Error.

A. declared in caſe againſt *B.* for ſinking his boat, and after averring a non-feaſance in *B.* as the cauſe, ſtated him to have acted with *great force and violence* in accompliſhing the injury; *A.* recovered, and on error brought becauſe the action ſhould have been treſpaſs not caſe, and becauſe the two actions were mixed, the Court referred the concluding expreſſions to the non-feaſance firſt ſtated, and held the declaration ſufficient to ſupport the judgment.

“ *Nottinghamſhire* to wit. Be it remembered that on *Wedneſday* next &c before our Lord the King at *Weſtminſter* come the Plaintiffs by *S. B.* their attorney and bring into the court of our ſaid Lord the King before the King himſelf now here their certain bill againſt the Defendants being in the cuſtody &c *of a plea of treſpaſs on the caſe* and there are pledges &c which ſaid bill follows in theſe words; *Nottinghamſhire* to wit, The Plaintiffs complain of the Defendants being in the cuſtody &c For that whereas the Plaintiffs before and at the time of the grievance hereinafter committed to wit on &c were lawfully poſſeſſed of a certain boat or veſſel then navigating and floating on the river *Trent* being a public navigable river and King's common highway and then and there drawn and hawled on the ſaid river by certain cattle to wit 10 horſes then and there affixed and faſtened to the ſame and hawling the ſame on the ſaid river and of divers goods &c in the ſaid boat &c to wit at &c and which ſaid boat or veſſel was then and there under the care and guidance of certain of their ſervants And whereas alſo the Defendants on the ſame day and year aforeſaid were poſſeſſed of a certain other boat or veſſel then floating and navigating on the ſaid river drawn and hawled by certain cattle to wit 10 horſes then and there affixed and faſtened by certain ropes or hawling-lines to and hawling the ſame upon the ſaid river to wit at &c and which ſaid laſt mentioned boat or veſſel was then and there under the care and guidance of certain ſervants of the Defendants And whereas before and at the time of the grievance hereinafter mentioned to wit on &c at &c the ſaid boat or veſſel of the Plaintiffs had overtaken and had occaſion to paſs by the ſaid boat or veſſel of the Defendants on which occaſion the Defendants by their ſaid ſervants ſo conducting and navigating their ſaid boat or veſſel ought then and there to have ſlackened the ſaid ropes or lines with which the ſaid cattle were ſo faſtened to their ſaid boat or veſſel ſo as to permit the ſaid boat or veſſel of the Plaintiffs to paſs over the ſame whereof they then and there had notice, Yet the Defendants by their ſaid ſervants not regarding their duty in this behalf but contriving and wrongfully intending to hurt injure and prejudice the Plaintiffs in this behalf did not nor would ſlacken the ſaid ropes or lines or permit or ſuffer the ſaid boat or veſſel of the Plaintiffs to paſs the ſaid boat or veſſel of them the Defendants but on the contrary thereof then and there to wit on &c at &c by their ſaid ſervants in that behalf wrongfully unlawfully and injuriouſly drove on the ſaid cattle hawling and drawing their ſaid boat or veſſel with great force and violence and thereby forced and drove the ſaid boat or veſſel of them the Defendants againſt the ſaid boat or veſſel of the Plaintiffs by reaſon whereof and by and through the ſtraining and preſſure of the ſaid ropes or lines thereby and forcing the ſaid boat or veſſel againſt the ſaid boat or veſſel of the Plaintiffs the ſaid boat or veſſel with the ſaid goods &c on board her as aforeſaid was driven and forced acroſs the ſtream there and ſunk and the ſaid boat or veſſel was not only greatly damaged and ſpoiled thereby but the ſaid goods &c were ſpoiled &c and the Plaintiffs loſt the benefit of the voyage &c and were obliged to ſpend a large ſum of money &c and alſo divers ſervants and horſes of the Plaintiffs were for a long time out of employ and of no uſe to the Plaintiffs to wit at &c."

The 2d count ſtated, that the Defendants "ought to have permitted and ſuffered the ſaid boat or veſſel of the Plaintiffs to paſs the ſaid boat or veſſel of the Defendants" but that they did not, omitting the circumſtance of ſlackening the rope, but being in all other reſpects ſimilar to the 1ſt count.

The 2d and 3d counts were for negligently and ignorantly conducting the veſſel.

Plea, Not guilty. Verdict for the Plaintiffs and judgment in the *King's Bench* accordingly.

The Defendants aſſigned for errors in this court, "that by the record aforeſaid it appears that the Plaintiffs have in the 1ſt count of their ſaid declaration complained againſt the Defendants as if the whole of the ſaid cauſe of action in that count mentioned had been a mere conſequential injury, whereas ſo much of the cauſe of action in that count mentioned as aroſe from the driving on the ſaid cattle in that count mentioned with great force and violence and thereby forcing and driving the ſaid boat or veſſel of them the Defendants againſt the ſaid boat or veſſel of the Plaintiffs appears to have been a direct and immediate treſpaſs and injury committed by the ſaid Defendants on the property of the ſaid Plaintiffs." The ſame as to the 2d count. And "that the Plaintiffs have complained againſt the Defendants for the whole of the cauſes of action mentioned in the ſaid declaration *as in a plea of treſpaſs on the caſe* whereas for ſo much of the cauſe of action in the ſaid declaration mentioned as aroſe from the ſaid driving on the ſaid cattle in the 1ſt count of the ſaid declaration mentioned with great force and violence and thereby driving and forcing the ſaid boat or veſſel of the Defendants againſt the ſaid boat or veſſel of the Plaintiffs, they ought to have complained againſt the Defendants *in a plea of treſpaſs vi et armis*." The ſame as the 2d count. And "that in the ſaid declaration there are comprehended and included cauſes of action different and diſtinct in their natures to wit cauſes of action founded on immediate direct and forcible injuries and treſpaſſes and cauſes of action founded on injuries that are merely conſequential; which cauſes of action are incompatible with each other and ought not to be joined in the ſame declaration."

Joinder in error.

Wood for the Plaintiffs in error. The errors aſſigned apply to the 1ſt and 2d counts only, in which the breaches ſtated are clear acts of treſpaſs. The diſtinction between the actions of treſpaſs *vi et armis* and treſpaſs on the caſe, is perfectly ſettled; "if the injury be committed by the immediate act complained of, the action muſt be treſpaſs; if the injury be merely conſequential upon that act, an action on the caſe is the proper remedy." *Per* Lord *Kenyon* in *Day* v. *Edwards*, 5 *Term Rep.* 649. The injury here complained of was the immediate act of the Defendants' ſervants; no negligence is ſtated in either of the two firſt counts. In *Day* v. *Edwards* an action on the caſe being brought againſt the Defendant for driving his cart againſt the Plaintiff's carriage, it was held bad on demurrer; and the only difference between that caſe and the preſent, conſiſts in the injury having been there committed by the Defendant himſelf, whereas here it was committed by the Defendants' ſervants. But this difference in circumſtance affords no diſtinction in principle; *Savignac* v. *Roome*, 6 *Term Rep.* 125. The caſe of *Tripe and Dyer* v. *Potter*, before *Yates* J. at *Exeter* 1767, cited 6 *Term Rep.* 128. is ſtrongly analogous to the preſent; there the Plaintiff having declared in caſe againſt the Defendant for wilfully rowing his boat againſt the Plaintiff's net, whereby the Plaintiffs net was ſunk and the Plaintiff prevented from drawing it, *&c.* was nonſuited. And the principles laid down by Lord Chief Juſtice *De Grey* in *Scott* v. *Shepherd*, 2 *Bl.* 899. clearly eſtabliſh that if the act of the Defendant be immediately injurious to the Plaintiff, though the injury ariſe from accident, or the act which occaſions it be lawful, yet treſpaſs is the only remedy.

Wigley for the Defendants in error. Whatever might have been the event of this caſe on a demurrer, the Court will not now preſume any thing after verdict which can defeat the Plaintiffs' judgment. *Slater* v. *Baker and another*, 2 *Wilſ.* 359. It appears that in ſome caſes either treſpaſs or caſe will lie. Thus in *Pitts* v. *Gaince and another*, 1 *Salk.* 10. where it was objected that caſe by the maſter did not lie for entering and detaining a ſhip, but treſpaſs only, *Holt* Ch. Juſt. held that either action might have been maintained. In *Scott* v. *Shepherd* it was ſaid by *Blackſtone* J. that every action of treſpaſs with a *per quod* includes an action on the caſe; and that a man may bring treſpaſs for the immediate injury and ſubjoin a *per quod* for the conſequential damages, or caſe for the conſequential damages and paſs over the immediate injury; and for this he cited 11 *Mod.* 180. So in *Slade's caſe*, 4 *Co.* 94. *b.* a caſe is put where a man may have "a general writ of treſpaſs or an action upon his caſe," and in *Hob.* 180. and *Sty.* 99. the ſame doctrine is laid down. It was thrown out in argument in *Savignac* v. *Roome*, that the maſter is not anſwerable for the wilful wrong of his ſervant, and for this was cited *Jones* v. *Hart*, 2 *Salk.* 441. and the marginal abſtract there; if however the act whether wilful or not be done in the maſter's ſervice, the maſter is anſwerable. 1 *Ld. Raym.* 265. 2 *Term Rep.* 154. It was indeed intimated in *Sanderſon* v. *Baker and another*, 2 *Black.* 832. 3 *Wilſ.* 309. S. C. that there ſhould be a recognition of the ſervant's act by the maſter in order to fix the latter; but that is now held unneceſſary (*a*). Had this appeared at the trial to have been an act altogether unauthorized by the Defendants, or a clear treſpaſs, in either caſe the Plaintiffs would have been nonſuited, *Haward* v. *Bankes*, 2 *Burr.* 1113, and therefore the Court after verdict will ſuppoſe it to have been ſo proved as to ſupport the judgment. Indeed in *Morley* v. *Gaisford*, 2 *H. Bl.* 443. the Court ſaid it would be difficult to put a caſe where a maſter could be conſidered as a *treſpaſſer* for the act of his ſervant, unleſs done by his command.

(*a*) See *Buſh* v. *Steinman*, *ante* 404.

TURNER *v.* HAWKINS.

Day v. *Edwards* was on demurrer, and in *Savignac* v. *Roome* the injury was ſtated to have been done *wilfully*, which was much preſſed in argument. The preſent cauſe of action was a mere non-feaſance, for the injury is averred to have ariſen from not ſlackening the rope, in conſequence of which the Plaintiffs' boat was ſunk.

EYRE Ch. J. Undoubtedly we ought to endeavour to preſerve the diſtinction of actions, and therefore if it appear upon the pleadings that actions of a different nature have been mixed, that is a ſufficient ground for arreſting the judgment. That point however ought to be very clearly made out, where the objection is taken after verdict. Now if we read this declaration with that favour to which it is intitled after verdict, the judgment may well be ſupported without reference to all that learning which has been cited in its ſupport. The cauſe of all the miſchief which has happened in this caſe, was the Defendants' ſervants not ſlackening the rope as it was their duty to have done, and in conſequence of which neglect the horſes went on in a way injurious to the Plaintiffs. It is therefore extremely clear that the cauſe of action was a non-feaſance, and it is fair to infer that it was not intended to charge the Defendants with *wilfully driving* their boat againſt that of the Plaintiffs. All the circumſtances alleged are referable to the non-feaſance, which makes it a compleat action on the caſe. The injury is not laid to have been done *wilfully*, but *wrongfully*, which is applicable to caſe, and indeed to make it treſpaſs, we muſt entirely overlook the non-feaſance. This being ſo, we may paſs over all the learning which has been collected, and decide the caſe on that ground on which the whole reſts, *viz.* a fair underſtanding of the declaration, referring the different expreſſions to that firſt cauſe to which they are juſtly referable

Per Curiam. Judgment affirmed (*a*).

(*a*) The ſame in principle is the caſe of *Ogle and another* v. *Barnes and others*, 8 *Term Rep.* 188. There the declaration in caſe having alleged negligence and unſkilfulneſs in the Defendants' management of a ſhip, by reaſon whereof ſhe ran foul of the Plaintiffs' ſhip with *great force and violence*, and damaged her, the Court of *K. B.* on a motion in arreſt of judgment, on the ground of the action having been caſe when it ought to have been treſpaſs, refuſed to imply any act wilfully done by the Defendants, and held the action well conceived.

CHAUNT *v.* SMART.

April 25th.

No rule for an attachment to be abſolute in the firſt inſtance except for non-payment of coſts upon the prothonotary's *allocatur.*

SHEPHERD Serjt. moved for an attachment againſt the Defendant for neglecting to deliver up a promiſſory note in purſuance of an order of *Niſi Prius*, which had been made a rule of Court, and ſerved upon him with a demand of the note. There was ſome difficulty at firſt as to the manner in which the rule ought to be drawn up, the officers ſeeming to be of opinion, on the authority of *Townſend* v. *Baker*, *Barnes* 31, that the rule ſhould be abſolute in the firſt inſtance.

But *The Court* determined that a ſingle authority was not ſufficient to ſupport that doctrine; that the party though willing might not be able to deliver up the note, as in caſe of fire; that where any excuſe could be offered for diſobedience to the rule, the party ought to be permitted to ſhew cauſe; that in future the practice of this Court ſhould be conformable to that of the *King's Bench* (a), and the rule ſhould be to ſhew cauſe why the attachment ſhould not iſſue in all caſes except of non-payment of coſts on the Prothonotary's *allocatur*.

(a) *Tidd's Pract. K. B.* 256.

Ex parte BENJAMIN LAWRENCE.

April 26th.

The Court of *Chancery* having refuſed to diſcharge a priſoner in cuſtody for not putting in an anſwer *unleſs on payment of the fees*, he applied to *C. B.* to be diſcharged under the inſolvent act 34 *G.* 3. *c.* 69. but was refuſed; his contempt not conſiſting in the non-payment of money.

CLAYTON Serjt. applied to the Court to diſcharge the petitioner out of the cuſtody of the Warden of the *Fleet*, under the following circumſtances. In 1784 the priſoner being then under confinement in *Glouceſter* gaol for debt, was ſerved with a *ſubpœna* iſſued out of *Chancery* at the ſuit of *G. Mayo*; in 1785 he was removed by *Habeas Corpus* to the *Fleet*, and his poverty diſabling him from putting in any anſwer to *Mayo*'s bill, a decree that the bill be taken *pro confeſſo* was obtained againſt him, on which he was regularly charged in cuſtody for the contempt, and the fees amounting to near 50 *l.* remained unpaid. On the 15th of *September* 1794 he was brought up at the Quarter Seſſions for the City of *London*, in order to take the benefit of the inſolvent act 34 *Geo.* 3. *c.* 69. but was remanded, it appearing in the copy of the cauſes wherewith he ſtood charged in cuſtody, that he was detained by virtue of an attachment iſſued out of *Chancery*. Application was then made to the Court of *Chancery* to diſcharge him, which was refuſed *unleſs upon payment of the fees*. *Clayton*

him,

1796.
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now urged, that though he was in cuſtody for a contempt in point of form, yet that he was in reality detained for the non-payment of the fees incurred by that contempt.

The Court however were of opinion that no redreſs could be obtained by the priſoner, but from the Court of *Chancery*; for that though on payment of his fees, that Court had offered to diſcharge him, yet his contempt did not conſiſt in the *non-payment of money* (the term uſed in the 34 *Geo.* 3. *c.* 69.) and conſequently that he was not intitled to be diſcharged under that act.

Clayton took nothing by his motion.

April 26th.

GRAVALL *v.* STIMPSON.

A writ of error operates as a *ſuperſedeas* from the time of the allowance, not from the time of ſervice. Bail therefore muſt be put in within four days from the former period.

FINAL judgment was ſigned in this caſe, and a writ of error allowed on the 27th of *February*; on the 1ſt of *March* the Defendant's attorney ſerved the Plaintiff's attorney with the allowance of the writ of error; on the 3d of the ſame month the writ of *Fi. Fa.* was ſued out upon the judgment; and on the 4th bail in error was put in, execution under the *Fi. Fa.* having been previouſly levied in the morning of the ſame day. To quaſh this *Fi. Fa.* for irregularity and have the money levied under it reſtored to the Defendant with coſts, *Le Blanc* Serjt. on a former day obtained a rule *Niſi*: the queſtion being whether a writ of error operates as a *ſuperſedeas* from the time of it's allowance, or from the time of ſerving the allowance on the party?

Shepherd Serjt. ſhewed cauſe. A writ of error is a *ſuperſedeas* of execution from the time of it's operative allowance, provided bail be regularly put in. *Lane* v. *Bacchus*, 2 *Term Rep.* 44. Service of the allowance is only material to bring the party into contempt if he afterwards proceed to execution. Bail therefore muſt be put in within four days after the time of the operative allowance. In *Jaques* v. *Nixon*, 1 *Term Rep.* 279. the allowance of the writ of error was ſerved on the 31ſt of *May*, final judgment was ſigned and execution ſued on the 14th of *June*, and within four days after that time bail was put in. This was held to be a *ſuperſedeas*; which could not have been the caſe, if the time of ſervice which was long before the judgment, had been the date of the operative allowance, for bail would not then have been put in within four days. The inconvenience of the contrary practice is a ſufficient argument againſt it: for if the Plaintiff in error were not compellable to put in bail, till within four days after ſervice of the allowance, he might wait for any length of time, till execution had been iſſued, and then harraſs the party by ſerving him with the allowance and putting in bail, by which the execution would be ſuperſeded.

Le Blanc in ſupport of the rule. The caſe of *Jaques* v. *Nixon* is diſtinguiſhable from this: for there the writ of error was allowed, and the allowance ſerved before final judgment, and bail was put in within four days after the judgment; but ſince bail could not poſſibly be put in until after judgment, and as the ſervice and allowance were ſuſpended till the judgment, and both began to take effect at that period at once, it cannot be collected from that caſe whether the operation of the writ of error as a *ſuperſedeas* commenced from the allowance or the ſervice.

EYRE Ch. J. This is a point extremely clear. The party has four days to put in bail after the allowance of the writ of error (*a*). It is indeed the practice to get the allowance of the writ of error previous to the judgment being ſigned; but that is an irregularity permitted for the convenience of the party, for the judgment in the action is the true foundation of the writ of error. The allowance therefore though previouſly obtained cannot be operative till judgment has been ſigned; and four days muſt then elapſe before the party ſigning it can ſafely ſue out execution. But if the writ of error be allowed after judgment has been ſigned, the party entitled cannot regularly ſue out execution until four days after the allowance.

BULLER J. Two things are requiſite to make a writ of error a *ſuperſedeas* of execution; to wit, the allowance, and putting in bail. If the writ of error be allowed before judgment, the time of putting in bail runs from the judgment, if after judgment from the time of the allowance.

Per Curiam. Rule diſcharged (*b*).

(*a*) That is after delivery of the writ to the clerk of the errors. *Reg. Mich.* 28 *Car.* 2. and it is from this delivery, not from the ſealing, that the writ operates as a *ſuperſedeas*. *Meriton* v. *Stephens*, *Barnes* 205. ed. 3. and *Sykes* v. *Dawſon*, *Barnes* 209.

(*b*) For the practice on this ſubject ſee *Tidd's Pract. K. B.* 868, 869. ed. 1. p. 1100, 1101. ed. 2.

FREEMAN *v.* JACKSON.

April 26th.

In an order to enlarge the time for pleading the firſt and laſt days are both reckoned incluſively.

AN action having been commenced in *Hilary* Term laſt, the Defendant on the 18th of *February* obtained an order for a month's time to plead, and on the 17th of *March* another order for three weeks further time.

On the 7th of *April* the Plaintiff ſigned judgment for want of a plea.

Runnington Serjt. now moved for a rule to ſhew cauſe why the judgment ſhould not be ſet aſide for irregularity, contending that it had been ſigned upon the day on which the time to plead expired; and that though it had been the practice of the Court to conſider both the days as incluſive, in computing the time under a rule to plead, yet that under an order to enlarge the time of pleading one of the days ſhould be excluſive.

But the officers of the Court concurring with *Adair* Serjt. who oppoſed the motion, that the days were in both inſtances computed incluſively, the Court held the judgment to have been regularly ſigned. It was however ſet aſide on terms for the purpoſe of letting in the merits.

On the next day *Runnington* endeavoured to revive the queſtion by a ſimilar motion, and was about to cite the caſe of *Kay* one &c. v. *Whitehead*, 2 *H. Bl.* 35. to ſhew that the judgment was irregularly ſigned: but was ſtopped by *Buller* J. (*abſente Eyre* Ch. J. and *Heath* J.) who ſaid, that as the judgment had been already ſet aſide, the Court could not attend to the motion, whether right or wrong.

April 27th.

GRIMES *v.* NAISH.

If the damages given by a verdict be reduced by an award under an order of *Niſi Prius* which is afterwards made a rule of Court, the party is entitled to have the poſtea delivered to him without any application to the Court.

SHEPHERD Serjt. moved, that the damages amounting to 100*l.* which had been found for the Plaintiff in this cauſe, ſhould be reduced to 26*l.* purſuant to an award under an order of *Niſi Prius* which had been made a rule of Court, that the poſtea ſhould be delivered to the Plaintiff, and that the judgment ſhould be entered for the latter ſum.

The *Court* were of opinion that the learned Serjeant ſhould withdraw his motion, the Plaintiff under ſuch circumſtances being entitled to have the poſtea delivered to him without any application to the Court (*a*).

(*a*) Vid. *Higgingſon* v. *Neſbitt*, *ante* 97. where the Court gave leave to enter up the judgment without a rule to ſhew cauſe.

April 27th.

MADOX *v.* EDEN.

The Court will not diſcharge a Defendant on a common appearance on the ground of infancy.

COCKELL Serjt. moved to diſcharge the Defendant out of cuſtody on entering a common appearance. The affidavit ſtated that the action was brought on a promiſſory note given by the Defendant, who was under age:

But the *Court* were of opinion, that as his infancy could not unleſs pleaded (*a*) exonerate him from the debt, and as it was not certain as yet that he would plead it, it was no ground for the Court to diſcharge him out of Cuſtody.

Cockell took nothing by his motion.

TABRUM *v.* TENANT.

April 28th.

One obligee in a joint bond having ſued out a *Capias* againſt the obligor, and taken a recognizance of bail in his own name only, afterwards ſued out an *Original* in the name of both obligors, and then applied to the Court to amend both the *Capias* and recognizance; the Court granted the former but refuſed the latter.

THE Defendant having entered into a bond for the payment of a ſum of money to this Plaintiff and one *Lightfoot*, which became forfeited, an action was commenced upon the bond, a *Capias ad reſpondendum* iſſued, and recognizance of bail taken at the ſuit of *Tabrum* alone. On diſcovery of the miſtake an original was ſued out in the joint names of *Tabrum* and *Lightfoot*, and an application was made to the Court to allow the *Capias ad reſpondendum* and recognizance of bail to be amended by the original by the inſertion of *Lightfoot*'s name as a Co-plaintiff.

Le Blanc and *Marſhall* Serjts. now ſhewed cauſe againſt a rule *Niſi* obtained for that purpoſe, and contended, that this if allowed would not be a correction of the proceedings in conformity to the writ by which they were commenced, but an adaptation of them to a new original, the foundation of a new action; and that it was not a clerical error, nor within the Statute of *Jeofails*: they inſiſted that the bail who had only made themſelves reſponſible for the Defendant in the ſeparate ſuit of *Tabrum*, could not without their conſent be bound to diſcharge the joint demand of *Tabrum* and *Lightfoot*; and that poſſibly the ſame bail who were willing to keep the Defendant out of priſon, knowing that the Plaintiff had miſconceived his action and could not finally recover, would object to engage themſelves when, by the correction of that error, they were likely to be damnified.

Shepherd Serjt. in ſupport of the rule, urged that ſtronger inſtances of amendments had occurred, as where a new bill had been filed

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(*a*) It ſhould ſeem that this expreſſion muſt not be confined to the Defendant's putting his infancy on record, but that it applies generally to his making it a defence; for in *Seaton* v. *Gilbert*, 2 *Lev.* 144. Lord *Hale* permitted infancy to be given in evidence on *non aſſumpſit*, and in *Darby* v. *Boucher*, 1 *Salk.* 279. *Treby* Ch. J. having doubts on the ſubject, referred it to the Judges, ten of whom then preſent held that it might be ſo given in evidence. The ſame doctrine is laid down by Lord *Holt*, 1 *Ld. Raym.* 389. and is adopted in *Bull. N. P.* 152. where *Gilb. Hiſt. C. B.* 64, 65. ed. 2. is referred to.

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filed after judgment to amend a declaration; *Marſhall* v. *Riggs*, 2 *Str.* 1162. or writs of execution had been amended by the previous proceedings; *Hunt* v. *Kendrick*, 2 *Bl.* 836. *Laroche* v. *Waſbrough*, 2 *Term Rep.* 737. and *Newnham* v. *Law*, 5 *Term Rep.* 577. He contended, that at leaſt the Court would permit an amendment of the *Capias ad reſpondendum*, if not of the recognizance of bail, which would ſecure to the Plaintiffs the benefit of the Defendant's appearance; for that though the bail ſhould be diſcharged, ſtill the having put them in would amount to an appearance, as is the rule in caſes where bail are diſcharged by the Plaintiff's declaring in a different county from that in which they are put in (*a*).

Per Curiam. The recognizance cannot be amended, for the bail may not be charged but by their own conſent. With reſpect to the *Capias* that may be amended by the conſent of the Defendant, who will in that caſe be in as good a ſituation as he is at preſent; for if this amendment were refuſed, a declaration might be delivered at the ſuit of *Tabrum*, and immediately afterwards a declaration by the bye at the ſuit of *Tabrum* and *Lightfoot*.

Accordingly that part of the rule which related to the *Capias* was made abſolute by conſent (*b*); and that which related to the recognizance was diſcharged.

(*a*) Vid. *Yates* v. *Plantin*, 3 *Lev.* 235.

(*b*) Qu. Whether the Court would not have amended the *Capias* without the Defendant's conſent? See *Davis* v. *Owen*, *ante* 342.

SYMONDS et Ux *v.* COBOURNE.

April 28th.

The Court cannot order an annuity bond to be *delivered up to be cancelled* for want of a memorial purſuant to 17 *Geo.* 3. *c.* 26, though it be void by the 1ſt ſection of that act. *Quære*, Whether in ſuch a caſe they would ſtay proceedings on the bond?

A RULE was obtained upon a former day, to ſhew cauſe why an annuity bond made to *Symonds*, by the Defendant *Cobourne* and another perſon, ſhould not be delivered up to be cancelled, for want of a memorial, in purſuance of the annuity act. An action had been commenced on the bond by the Plaintiffs againſt the Defendant.

Le Blanc now ſhewed cauſe, inſiſting that by the firſt clauſe of the act the bond was merely void, and that the caſes where the Court interfered by ordering deeds, &c. to be delivered up to be cancelled, were founded on the 4th ſection of the act (*a*).

EYRE Ch. J. The motion ſhould have been to ſtay proceedings: perhaps that might not have been granted, but the Defendant put to plead the circumſtances. However, as no ſtay of proceedings is prayed by this motion, the rule muſt be diſcharged.

Per Curiam. Rule diſcharged.

(*a*) See the form in which the rule was made abſolute in *Dalmer* v. *Barnard*, 7 *Term Rep.* 253; alſo *Ex parte Anſell*, *ante* 66, in the note.

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CAPADOSE *v.* CODNOR.

April 30th.

The indorſements on the certificate of regiſtry required by 7 & 8 *W.* 3. *c.* 22. and 26 *Geo.* 3. *c.* 60. *ſ.* 16. need not be recited in the deed of aſſignment of a ſhip under *ſ.* 17. of the latter act.

TROVER for the ſhip *Caſtor and Pollux*. At the trial before *Eyre* Ch. J. it appeared that the ſhip having been built in the year 1790, was transferred by the builders to the preſent Defendant under the grand bill of ſale, when a certificate of *Britiſh* regiſtry was obtained by the Defendant for himſelf as owner and maſter, and ſeveral voyages in her were performed by him as ſuch; that in 1791 the Defendant having had conſiderable dealings with *G. Lempriere* a merchant in *London*, and being then indebted and likely to become more ſo to him, aſſigned the *Caſtor and Pollux* by way of ſecurity, and delivered poſſeſſion of the grand bill of ſale; that in the deed of aſſignment the certificate of the regiſtry of the ſhip was truly and accurately recited in words at length, purſuant to the directions of 26 *Geo.* 3. *c.* 60. *ſ.* 17; that on the 3d of *April* 1792 *G. Lempriere* in conſequence of ſome tranſactions by which he became indebted to the Plaintiff, executed to him an indenture, which after reciting the aſſignment from the Defendant, and the debt due from him to *G. Lempriere* as well as that from *G. Lempriere* to the Plaintiff, aſſigned *G. Lempriere*'s intereſt in the ſhip to the latter, ſubject to redemption on payment of the money due on the 2d of *July* following; that in this aſſignment as in the former, the certificate of the ſhip's regiſtry was truly and accurately ſet forth; that at this time the Defendant was on a voyage with the ſhip and acting as maſter, and that previous to his return *G. Lempriere* having become bankrupt, he refuſed (*a*) to deliver up the ſhip to the Plaintiff. The objection ſtated at the trial to the Plaintiff's recovery, was, that neither in the aſſignment to *Lempriere*, nor in that to the Plaintiff was there any recital of ſuch indorſement of the change of property made on the certificate of regiſtry, as was originally required by 7 & 8 *W.* 3. *c.* 22. (*b*)

and

(*a*) This was in conſequence of an indemnity given him by the houſe of *De Fiott* and Co. to whom *G. Lempriere* was alſo indebted. On the Defendant's refuſal the ſhip was arreſted by Admiralty proceſs, at the ſuit of the Plaintiff; and in conſequence the Defend. filed a bill in *Chancery* againſt the Plaintiff, the aſſignees of *G. Lampriere*, and *De Fiott* and Co. as amicable Defendants; on the hearing the Maſter of the Rolls ſtrongly inclined in favour of the preſent Plaintiff, but ſuggeſted the objection now made, and retained the bill for a year, in order that the queſtion might be tried at law.

(*b*) The 21 ſect. of 7 & 8 *W.* 3. *c.* 22. enacts that "in caſe there be any alteration of "property in the ſame port, by the ſale of "one or more ſhares in any ſhip after regiſ"tering thereof, ſuch ſale ſhall always be "acknowledged by indorſement on the certifi-

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and ſubſequently with ſome alterations by 26 *Geo.* 3. *c.* 60. *ſ.* 16. A verdict was found for the Plaintiff, with liberty to the Defendant to move to ſet it aſide and have a verdict entered the other way.

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CAPADOSE *v.* CODNOR.

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EYRE Ch. J. This is an important point, depending upon the conſtruction of particular acts of parliament, which are the bulwarks of the commerce of this country and the great tower of our naval ſtrength. The conſtruction of thoſe acts muſt be made on a full conſideration of their letter and ſpirit taken together. If it were ſhewn to be eſſential to a compliance with the ſpirit of the ſtatutes referred to, that the indorſement ſhould be recited as a part of the certificate, that would go far to eſtabliſh the neceſſity of ſuch a recital. Let us ſee then how far the nature and extent of theſe legiſlative proviſions ſerve to explain the clauſe on which this queſtion principally turns. The object of theſe laws was, to confine the advantage of trading to the plantations to *Britiſh* ſubjects and to *Britiſh*-built ſhips. In order to prevent evaſions, it was neceſſary that the public ſhould have the means of aſcertaining without difficulty who were the owners, who were the maſters of the ſhips, and what particular ſhips were employed in that trade.

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1796.
Capadose v. Codnor.

But the transfer of ſhips from one owner to another was no otherwiſe intereſting to Government than to prevent their coming into the hands of foreigners. The 7 & 8 *Will.* 3. *c.* 22. *ſ.* 17. therefore directs that the name of every ſhip trading to the plantations, the port to which ſhe belongs, the maſter's name, the kind of built, the burthen, the place where and the time when built, and the owner's name ſhall be regiſtered upon oath, together with a declaration that no foreigner directly or indirectly hath any intereſt therein. By the 18th ſection a copy of the oath upon which the regiſter is made is to be delivered to the maſter of the ſhip by way of certificate to prevent his being interrupted by confiſcation; and by the 21ſt ſection of the ſame ſtatute it is provided, that upon every alteration of property the ſale ſhall be acknowledged by indorſement on the certificate, in order to prove in caſe of diſpute that the entire property remains in *Britiſh* ſubjects. The 26 *Geo.* 3. *c.* 60. *ſ.* 16. goes beyond this, introducing a more circumſtantial indorſement, and enacting that a copy of this indorſement ſhall be ſent to the public officer authoriſed to grant certificates, who after having made a memorandum of it himſelf is to tranſmit it to the commiſſioners of the cuſtoms. By theſe means the real owner muſt be known both at the port and the cuſtomhouſe, which is a very important ſtep towards preventing a ſecret conveyance to foreigners. It is indeed provided, that upon every transfer of the property of the ſhip, the certificate ſhall be recited in the bill of ſale. But if it were alſo neceſſary under this proviſion to recite the indorſements made on ſuch certificate, upon every ſucceſſive transfer, it would be equally neceſſary to recite the indorſements made upon the ſeveral changes of maſters, as directed by 26 *Geo.* 3. *c.* 60. *ſ.* 18. I am of opinion however, that it is ſufficient to ſend copies of the indorſements to the public offices: and that the certificate itſelf is enough to ſhew the owner. In this caſe there was no indorſement on the transfer to *Lempriere*, and it would be peculiarly hard upon the preſent Plaintiff to hold the aſſignment to him void becauſe he did not require indorſements to be made in order to be recited. Theſe parties choſe to run the riſk of confiſcation: the certificate, ſuch as it was at the time of the ſale, was recited: and were it neceſſary to decide whether the want of indorſement upon the certificate made the aſſignment void, I ſhould incline to think that it did not (*a*). Much has been ſaid in favour of the policy of reciting

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(*a*) By 34 *Geo.* 3. *c.* 68. *ſ.* 15. the form of the indorſement is altered, and all contracts for ſale are now made abſolutely void, unleſs ſuch indorſement be duly made, and a copy thereof delivered to the perſon authorized to grant certificates.

the indorſements, but I think it has not been ſhewn that it was made neceſſary by the proviſions of 26 *Geo.* 3. *c.* 60.

BULLER J. It is not neceſſary to decide whether the want of indorſements avoids the aſſignment; for the queſtion here is, Whether the bill of ſale be inſufficient becauſe the indorſements are not recited therein? I think that the Legiſlature looked to the public intereſt only, as appears by all the proviſions of the act, and that they did not regard the purchaſer. If the certificate of regiſtry muſt be entered at the Cuſtomhouſe with the indorſements thereon the ſhip's owner muſt be known, and as the purchaſer muſt have the certificate of regiſtry recited in the bill of ſale he will be directed thereby to reſort to the Cuſtomhouſe for any information which he may want. If therefore the public be ſufficiently ſafe without any recital of the indorſements we ought not to hold this bill of ſale void, the words of the act not having expreſsly required their inſertion. It has been aſſumed that no transfer takes place till the indorſement: but that is not true, for the indorſement muſt always be ſubſequent to the transfer.

HEATH J. This queſtion turns on the 17th ſection of the 26 *Geo.* 3. *c.* 60. How can the indorſement be conſidered part of the certificate of regiſtry? The certificate belongs to an antecedent tranſaction; and is complete without the indorſement, which is not like a condition on bonds or bills of exchange, where it alters the quality of the bill or bond, but is only evidence of a ſubſequent ſale, though introduced in that place. We cannot go beyond the words of the act to create a caſe of forfeiture.

ROOKE J. The 26th of *Geo.* 3. not having required any recital of the indorſements, we cannot extend its proviſions to the prejudice of theſe parties.

Poſtea to the Plaintiff.

The Mayor and Commonalty and Citizens of the City of LONDON *v.* The Mayor and Burgeſſes of the Borough of LYNN REGIS commonly called KING'S LYNN in the County of NORFOLK; In Error.

May 2d.

(In the *Houſe of Lords.*)

If toll be merely *claimed* of the individual members of a corporation exempt from toll, an action well lies on the writ *De eſſendo quietum de theolonio* in the name of the corporation.

THIS action was commenced in the Court of *Common Pleas* by the preſent Plaintiffs in error, on the writ *De eſſendo quietum de theolonio.*

1796.

The Mayor, &c. of London *v.* The Mayor, &c of LynnRegis commonly called King's Lynn.

The declaration began by mentioning that the corporation of King's *Lynn* was *ſummoned* to anſwer why they *required* the citizens of *London* to yield toll within *King's Lynn*. It then alleged that the city of *London* was a body corporate by preſcription, by divers names, and for fifty years laſt, by the name of the Mayor, and Commonalty, and Citizens of the City of *London*, and that the *citizens* of *London*, amongſt other liberties and privileges, had time out of mind enjoyed, and ſtill were accuſtomed and ought to enjoy, the liberty and privilege that they and all their goods ſhould be quit, and free of and from all toll, paſſage, laſtage, and other cuſtoms, throughout *England*, and the King's ports, except his priſage of wines; which liberties and privileges were alleged to be confirmed by divers acts of parliament. It then recited that the King, by writ under the Great Seal, *commanded* the corporation of *King's Lynn* to permit the citizens of *London* to be quit of ſuch toll, and other cuſtoms, in *King's Lynn*, or to ſignify cauſe why not, but that the corporation of *King's Lynn*, not regarding the writ, had not ſignified to the King, as by the writ was commanded, and ſince the writ had *diſquieted* the citizens of *London*, and *required* of five of them who were named, and of other citizens of *London*, toll, paſſage, and laſtage, not being priſage of wine, of their goods within *King's Lynn* and its port, *in contempt of the King*, and to the *damage* of the corporation of *London*, of 100 *l.*

The corporation of *Lynn* pleaded, firſt, that the citizens of *London* had not been accuſtomed, and ought not to enjoy ſuch liberty and privilege of being free of toll and other cuſtoms, except the King's priſage; ſecondly, that the five citizens named were not citizens of *London*, as alleged.

Iſſue was joined on both pleas.

In *Eaſter* Term, 1789, the cauſe was tried at the Bar of the Court of *Common Pleas*, (ſee 1 *H. Bl.* 206.) when a verdict was found for the corporation of *London*, on both iſſues, with one ſhilling damages, which damages were ſtated in the record to have been remitted by the corporation of *London* to the corporation of *King's Lynn*. The judgment was, that the citizens and all their goods ſhould be quit of yielding ſuch toll, *&c.*

On this judgment a writ of error was brought in the *King's Bench*, and in *Hilary* Term, 1791, the judgment of the *Common Pleas* was reverſed. (See 4 *T. R.* 130.)

The Mayor, &c. of LONDON *v.* The Mayor &c. of LYNN RE commo calle KING LYNN

In conſequence of this, the preſent Plaintiffs brought a writ of error returnable in parliament, and aſſigned general errors: to which the Defendants having rejoined, the Plaintiffs hoped the judgment of the *King's Bench* would be reverſed for the following among other REASONS:

I. Becauſe the objection made below, by the Defendants in error, that the writ *De eſſend. quiet. de theol.* is a writ merely prohibitory, on which no action can be maintained, has no foundation. This ſufficiently appears from the precedents of attachments on this writ given in the Regiſter (258. *b.* and the following pages), which run thus: *Si* A. *fecerit*, *&c.* "*tunc pone*, *&c.* B. *&* C. *&c.*" being manifeſtly proceſs to bring in the Defendants to anſwer to an action.

II. Becauſe another objection, inſiſted on by the Defendants in error, that the action, ſuppoſing an action to lie, ought to be by the individual citizens aggrieved, and not by the corporation of *London*, appears to be equally groundleſs. In *Fitz. N. B.* (227. E.) it is laid down, that "all the corporation may bring the "writ by the name of their corporation, and may have an *alias* "and attachment thereupon, if need be;" by which muſt be underſtood the proceſs of attachment in the Regiſter, neither that book nor *Fitzherbert*, any where alluding to a criminal attachment on this writ.

III. Becauſe the objection principally relied on by the Defendants in error was, that this action is not maintainable where no diſtreſs has been taken; which objection the Plaintiffs in error ſubmit cannot be ſupported for the reaſons, and upon the authorities following:

It is evident that *De eſſend. quiet. de theol.* and *Monſtraverunt* are no more than different names for the ſame writ, ariſing from a very ſlight variation in the form. The *Regiſter* contains no ſuch title as *Monſtraverunt:* but ſeveral writs of *Monſtraverunt* are inſerted in the title *De eſſend. quiet. de theol.* Burgeſſes may have *Monſtraverunt* (*Regiſter*, 259. *b.*), and tenants in ancient demeſne may have the writ *De theol.*; and all the tenants may ſue as in *Monſtraverunt* (*Fitz. N. B.* 228. B.); ſo that every authority as to the one is an authority as to the other. Lord *Coke* (1 *Inſt.* 100. *a.*) ſays expreſly, that a man may have *Monſtraverunt* before diſtreſs; by which he muſt be underſtood to mean the action of *Monſtraverunt*, having claſſed it with other writs, on all of which the

1796.

The Mayor, &c. of London v. The Mayor, &c. of Lynn Regis commonly called King's Lynn.

the remedy is by action. The *Regiſter* contains ſeveral precedents of writs *De eſſend. quiet. de theol.* and attachments on them, which do not ſtate a diſtreſs; and other precedents of the ſame writ which do. *Fitzherbert*, (*N. B.* 226. I.) in the outſet of the title, deſcribes this writ to lie where the King's officer will *demand* toll. After giving the form of the writ, he goes on to ſtate that the party may have an *alias*, *pluries* and attachment againſt thoſe who grieve him. The natural meaning is, that thoſe other writs are for a repetition of the ſame grievance complained of in the firſt; and *Fitzherbert* muſt be guilty of great inaccuracy if to found the attachment a new and different injury muſt have been committed in the mean time.

IV. Becauſe this writ is analogous to other writs on which an action may be maintained, and judgment given on the right, without actual damage, (*Co. Litt.* 100.); and ſuch an eſtabliſhment of the right ſeems peculiarly beneficial in a caſe like the preſent, of an exemption from toll claimed by a large body of perſons, where the particular injuries may be very numerous, and in each inſtance ſo inconſiderable, that the individuals aggrieved not chooſing to incur the expence of legal proceedings, may by continued acquieſcence weaken or deſtroy the right of the corporation; or if thoſe who claim the toll will not diſtrain for it, but bring actions of *aſſumpſit*, to which only the general iſſue can be pleaded, neither the corporation nor the perſons aggrieved have any means, if none are afforded by this writ, of ſtating their exemption on the record, and obtaining a deciſion which ſhall either eſtabliſh or deſtroy their claim for the future.

V. Becauſe if the taking of a diſtreſs were neceſſary, this declaration does ſufficiently allege it. By the precedent in the Regiſter (258. *b.*) it appears that "*quietos eſſe permittere non curaverunt*" is a ſufficient allegation in the attachment. The averment in this declaration is, that the defendants did diſquiet and did require toll; and it is impoſſible to contend that the declaration is bad in this reſpect, without contending that the attachment alſo, which ſtands upon the authority of the Regiſter, is equally bad.

VI. Admitting that the declaration ought, in ſtrictneſs of law, to have alleged a diſtreſs, the omiſſion of it is mere form, and aided by the verdict. If a diſtreſs be neceſſary to ſupport this action, the words "*quietos eſſe permittere non curaverunt*" in the attachment muſt be underſtood to mean diſquieting by diſtreſs; and if the defendants had taken iſſue upon this ſame allegation in

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the declaration, the Plaintiffs could not, ſuppoſing a diſtreſs neceſſary for the ſupport of the action, have entitled themſelves to a verdict without proving a diſtreſs. An actual diſtreſs cannot be more neceſſary to ſupport this action, than an actual impleading to ſupport a *warrantia chartæ;* and yet it is laid down in *Fitz. N. B.* (134 K.) that *in warrantia chartæ*, if defendant ſay that Plaintiff was not impleaded, he thereby confeſſeth the warranty, and Plaintiff ſhall have judgment to recover it. By the ſame rule, if the preſent Plaintiffs had alledged a diſtreſs in their declaration, and the defendants had denied it, they would have admitted the exemption, and the Plaintiffs muſt have had judgment for the acquittal. Here the exemption is found by the jury; and how can it be contended that the not ſtating a diſtreſs in the declaration prevents the Plaintiffs from recovering the acquittal, when, if the diſtreſs had been ſtated and denied by the Defendants, the Plaintiffs, notwithſtanding that denial, would be entitled to recover their acquittal?

VII. Becauſe, whether the exemption claimed by the city of *London* extended to all citizens, was a matter of fact to be determined by the jury on the trial of the iſſues; and the exemption being found as laid, the meaning of the term "citizens" cannot come in queſtion here.

J. Adair.
V. Gibbs.

The Defendants in error hoped that the judgment of the Court of *King's Bench*, reverſing the judgment of the Court of *Common Pleas*, would be affirmed, for the following, among other Reasons:

I. It is ſubmitted, that the antiquated writ *De eſſendo quietum de theolonio*, to which the corporation of *London* has thought fit to reſort, is not *remedial*, ſo as to bear the proceſs and pleadings of a ſolemn action; but is ſimply a command from the crown, which being diſobeyed ought not to be followed with any thing beyond an attachment for the contempt. Sir *Henry Finch*, in his profound diſcourſe on law, (*b.* iv. *c.* 48.) is a very pointed authority to this effect. The laſt chapter in that work treats of certain ſpecial writs wherein no proceſs lieth. It begins in theſe words:—"Thus far of an action, and the ſeveral "parts of it, and of writs both original and judicial that begin or "proſecute the action. Beſides which there are certain other

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"originals, which are, as it were, ſpecial anomalies and exceptions "from the former, being *not deductory to bring any matter into "plea or ſolemn action, but only commandatory or prohibitory to do "or leave ſomething undone.* And therefore *no proceſs at all "lieth in theſe Writs, but only an attachment upon a contempt for "not executing or obeying them.*"—After this introduction, Sir *Henry Finch* enumerates various writs of this ſpecial nature; and the laſt but two of theſe inſtances is the writ *De eſſendo quietum de theolonio.*

II. Should the writ *De eſſendo quietum de theolonio* be deemed ſo *remedial* as to bear an action, it is ſubmitted to be a point deſerving of conſideration, whether on the face of the record there is not an error in the proceſs againſt the corporation of *King's Lynn;* for the record ſtates them to have been only *ſummoned*, whereas there are precedents according to which an *attachment* ought to have been part of the proceſs.

III. It is apprehended to be an invincible objection againſt the corporation of *London*, that the ſort of *gravamen* or injury ſtated by them in their declaration is not actionable. They do not allege any *taking of a diſtreſs* for toll by the corporation of *King's Lynn.* The injury alleged is ſimply a *claim* or *requiring* of toll from the citizens of *London.* In other words, the action is brought, not for an *actual damage*, not for an *actual injury*, but merely for damage and injury *feared.* It is then an action *quia timet.* But the corporation of *King's Lynn* are adviſed, that there are only certain ſpecial caſes, in which an action *quia timet* is allowed by our law; and that this writ *De eſſendo quietum de theolonio* is not of the number. Lord *Coke* in his Commentary upon *Littleton*, (*fol.* 100. *a.*) thus enumerates the inſtances of actions *quia timet.* "Note, that there be ſix writs in law, that may be maintained, "*quia timet*, before any moleſtation, diſtreſs, or impleading; as, "1. A man may have his writ of meſne, (whereof *Littleton* "here ſpeaks) before he be impleaded. 2. A *Warrantia cartæ* "before he impleaded. 3. A *Monſtraverunt* before any diſtreſs "or vexation. 4. An *Audita querela* before any execution "ſued. 5. A *Curia claudenda* before any default of incloſure. "6. A *Ne injuſte vexes* before any diſtreſs or moleſtation.—And "theſe be called *Brevia anticipantia*, writs of prevention." Hence it is plain, that the writ *De eſſendo quietum de theolonio* did not occur to Lord *Coke*'s extenſive learning as one of the few anticipating

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writs, on which an action is ſuſtainable before *actual damage* received. It is obſervable alſo, that all of the few precedents hitherto explored and appealed to for the corporation of *London* ſeem to fail of ſerving their purpoſe in this reſpect. The firſt of theſe is the caſe of the 18th of *Edward* the Firſt againſt the bailiffs of *Southampton* in Mr. *Ryley's Placita Parliamentaria*, *p.* 13; and in that caſe the Abbot of *Saint Edward's Place*, who was the complainant, expreſsly ſtates, a diſtreſs upon his tenants by the bailiffs, and lays *damages* on that account. In the next precedent, which is the caſe of the King and divers citizens of *Lincoln* againſt the bailiffs of *Burton*, in the 22d of the ſame reign, as given in Mr. *Madox's Firma Burgi*, *p.* 138. the injury ſtated is, the having been aggrieved and diſquieted by *great diſtreſſes*, to the damage of the citizens of *Lincoln*, who were joined with the King as complainants. The third and remaining precedent is a caſe in the *King's Bench*, of the 2d of *Edward* the Second, in which certain tenants of the King's manor of *Brimmeſgrene* and *Norton* were Plaintiffs; and on a ſearch for this caſe, made in conſequence of its being cited from Lord *Coke*'s ſecond Inſtitute, (654. alſo in *Dugd. Warwickſhire*, 1ſt ed. *p.* 657.) the record has been found, by which it appears, that the plaintiffs alleged the making of diſtreſſes for toll and a damage thereby of 20*l.* With theſe precedents, originally cited for the corporation of *London*, but on this point at leaſt operating againſt themſelves, it may be proper to connect the chapter *De Libertatibus* in the ſecond book of *Bracton*, (*cap.* 24. § 4 & 5. *fol.* 57. *a*) In that part of *Bracton*, notice is taken of the remedy for thoſe diſquieted for toll in breach of their privilege of exemption granted to them by the crown. But in the only action there ſtated for ſuch an injury, both the writ and the count ſuppoſe an actual damage received by the Plaintiffs; for the writ calls upon the Defendants to anſwer *Quare ceperunt theolonium*, and the count ſpecifies a *diſtreſs* for the toll to the damage of the Plaintiffs in a certain ſum.

IV. It is alſo conceived to be an objection to the declaration of the corporation of *London* in the preſent caſe, that for the injury they have alleged they are not the proper Plaintiffs. The exemption from toll under the royal grants to *London* is conferred in favour of the individual citizens of that place, and theſe are competent to defend their right of exemption without aid of the corporation. The corporation of *London* is not even within the benefit of the exemption: for it ſeems to have been admitted in the

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the great caſe between *Waller* and *Hanger*, in the reign of *James* the Firſt, (3 *Bulſt.* 14.) on the *London* exemption from priſage, that if the chamber of *London* ſhould traffick, it muſt pay priſage; becauſe it is in their *politick* capacity as a corporation, and the exemption granted enures only for the citizens in their individual and natural capacities. If then an injury has been done in the preſent caſe, it is to the particular citizens, who are named as having been diſquieted by the demand of toll. But theſe are not ſo much as Co-plaintiffs in the action. In point of principle it appears a ſtrong propoſition to aſſert, that the corporation of *London*, upon whom no demand of toll is ſtated to have been made, and upon whom if they had traded it is apprehended the demand would be juſtifiable, ſhall yet be Plaintiffs for the injury from a demand of toll upon individual citizens, who, if the demand is actionable, are capable of ſuing for themſelves. But that the corporation of *London* ſhould be Plaintiffs is not merely quite unneceſſary. The receiving of them as ſuch ſeems to lead to two actions and two compenſations for the ſame injury; for a recovery of damages by the corporation of *London* might not be a bar to an action brought by the particular citizens immediately affected by the demand of toll. Beſides it is natural to aſk, where are the precedents to be found of ſuch an action by the corporation of any place for an injury to certain of its individual citizens. Here again, the three precedents, already referred to from *Ryley's Placita Parliamentaria*, *Madox's Firma Burgi*, and Lord *Coke's Second Inſtitute*, will not ſerve the purpoſe; for in each of them the particular citizens, who were aggrieved by having their right of exemption conteſted, were Plaintiffs. Thus it ſeems, that the interference of the *London* corporation, as champions fighting the cauſe of its citizens againſt the corporation of *King's Lynn*, is at the ſame time unneceſſary, irregular, and unprecedented.

V. Further it is ſubmitted to be a point deſerving of attention, whether the ſuit in the preſent caſe ought not to have been *qui tam*, that is, whether the corporation of *London* ought not to have ſued as well for the King as for themſelves. Latterly, indeed, the Courts appear to have been leſs ſtrict, in requiring actions *qui tam*, for matters including a contempt of the King, than in ancient times. But it is to be conſidered, that in the preſent caſe the action is not merely laid to the contempt of the King; but actually proceeds upon a diſobedience of the King's command, by writ under the great ſeal, expreſsly recited in the declaration as one of the main grounds of it. It is not the caſe of a contempt merely *virtual,* but of one of the moſt *direct* and *expreſs* kind. Perhaps, therefore, it may be found not to fall within the reach of thoſe authorities, according to which a Plaintiff has an election to ſue, either for the crown and himſelf, or for himſelf only.

VI. Laſtly, it is with very ſerious anxiety ſubmitted on the part of the corporation of *King's Lynn,* that the declaration of the corporation of *London* is eſſentially defective, in not ſtating how the five citizens, named as having been diſquieted by the demand of toll, are entitled to that denomination. More particularly it is not alleged, that they are both *freemen* and *inhabitant-houſeholders* of *London,* or indeed *inhabitants of any deſcription.* From the ſilence of the declaration in this reſpect, it may be inferred, that the citizens named are neither inhabitant-houſeholders of *London,* nor inhabitants in any reſpect; are not full and compleat citizens of *London;* but are perſons belonging to and reſident in other places, and merely connected with *London* by having purchaſed its freedom: in other words, are *non-reſident* freemen. That this is the real fact of the caſe, will not it is preſumed be diſavowed on the part of the corporation of *London:* for, one great object of the preſent ſuit between *London* and *King's Lynn* is to have it ſettled, whether non-reſident freemen of *London* are within the benefit of its charter exemptions from toll. It is not, indeed, admitted by *King's Lynn,* that the *London* exemption applies in any reſpect againſt the *King's Lynn* port-duties; becauſe as *London* founds upon charters, ſome of which are ancient enough to conſtitute a *preſcriptive exemption;* ſo on the other hand *King's Lynn* claims a *preſcriptive right of toll;* and thus if the latter can be made out, the queſtion will be, which preſcription ought to prevail, that is, which ſhall be preſumed to be moſt ancient. But though this is certainly a point of controverſy between the two corporations, yet, from the general verdict, this point is clearly not open to debate on the preſent record; and beſides the more immediate cauſe of the preſent contention certainly was the claim of *London* to ſhelter its *non-reſident freemen* from payment of the *King's Lynn* port duties. If the wiſh of the corporation of *King's Lynn* had prevailed, there would have been a ſpecial verdict in the preſent caſe, which would have brought forward this latter queſtion moſt completely and directly upon the record. But a general verdict having been given, the corporation of *King's Lynn* is driven into

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raiſing the queſtion about the *non-reſident freemen* of *London* by argument and inference from the want of any allegation or mention of reſidence in the Pleadings. However, it is conceived that the corporation of *London* will ſcarce decline meeting a queſtion ſo notoriouſly a main object of their interference by inſtitution of the preſent ſuit. It is hoped alſo, that ſhould they endeavour to avoid this latter queſtion, there will be found ſufficient defect in their declaration to juſtify forcing the point into diſcuſſion: for it is ſubmitted, that where any perſons claim to be exempt from the general law of the land, they ought to be very compleat, diſtinct, and particular, in ſetting forth the facts by which they qualify themſelves for ſuch exemptions; and that merely ſtyling the five perſons, named as having been diſturbed by the demand of toll, *citizens*, without ſpecifying how they are ſo qualified, is too looſe and general. On the information for a ſum due for priſage to the King's farmer, in the caſe of *Waller* and *Hanger*, in the reign of *James* the Firſt, it appears from a copy of the original record, that the Defendant, who claimed benefit of the *London* exemption from priſage as executrix of a deceaſed citizen, pleaded not only that her huſband was a clothworker of *London*, and had for twenty years before his death been *continually commorant and inhabiting* within *London*, but that ſhe the widow and executrix was a free woman of *London*, and *commorant and inhabiting* there.

An opening being thus made for the introduction of this great queſtion, whether *non-reſident freemen* of *London* are entitled to the benefit of the *London* exemption from tolls? it is deemed proper, on the part of the corporation of *King's Lynn*, to inſiſt againſt ſuch an extenſion of the privilege on theſe grounds:

(1) It is ſubmitted, that *non-reſidents* are neither within the words, nor within the intention of the charters of exemption.

In all the *London* charters the grant is in favour of the *homines* and *cives* of *London*. But how can one be ſaid to be a man and citizen of a place, in which he is neither houſekeeper, nor lodger, nor an inhabitant in any degree? The criterion of a citizen is *reality*, not merely a *name*. But a citizen without a houſe, without a family, without reſidence, is merely *nominal*; he wants the real qualifications. As too ſuch a perſon comes not within the deſcriptions of a citizen, ſo he is clearly not within the intent of the exemption. The privilege, as Lord *Hale* (*on ports and cuſtoms*, *Part III. Chap.* 3.) properly remarks on priſage, is not *intuitu perſonæ*, but *intuitu loci* (*a*). It is *local*, *not perſonal.* It is intended as a favour to perſons of one place, in preference to and by way of diſtinction from perſons of other places. But to admit the inhabitants of all places equally, merely becauſe they have purchaſed the freedom of the place privileged, is to deſtroy the diſtinction evidently intended; is to leave room for putting the inhabitants of all places upon the ſame footing; is to convert a local privilege into a perſonal one.—Beſides, other conſequences of holding the privilege to be independent of *reſidence* are monſtrous. It converts a *privilege of exemption* into a *power of exempting*. It transfers the *prerogative of exempting* from the crown to the corporation of *London;* and to every other corporation of the kingdom having grants of the ſame privilege. Nay, it more than transfers the prerogative of exempting: for it enables the ſubject to produce the effect of exemption, where the crown cannot exempt; that is, as againſt grantees of ancient tolls, whoſe grants of the tolls from the crown are prior in date to the crown grant of exemption from them; for the crown cannot exempt to the prejudice of exiſting grants of tolls. Further, it not only deducts from the crown the toll, which otherwiſe would be payable by *London*, and other places privileged in like manner, but enables *London*, and each of thoſe places, to annihilate all ancient tolls for all perſons throughout the kingdom; and ſo, from time to time, to render this ſpecies of revenue and property wholly unproductive both to the crown and its grantees. Nay, what is even worſe, it tends to change one toll for another;—to detract the ancient toll from its *real* proprietor, who is generally ſubject to *ſome burthen for the public benefit*, ſuch as the maintenance of a port,—and to ſubſtitute in its place a toll *uncompenſated by any ſuch benefit*, for the city of *London* and other privileged places *invading* this ſpecies of property, namely, a ſum of money for the purchaſe of their freedom, both in fraud of the crown and its grantees of ancient tolls, and to the detriment of the citizens of the very place exempted. If being *reſident*, and being a *houſeholder*, as well as being a *freeman*, are conſidered as part of the qualification of a citizen, all this aggregate of miſchief and injuſtice is avoided. But declare, that being a freeman without reſidence in any character and of any kind is ſufficient to exempt, and the whole of ſuch miſchief will immediately attach.

(*a*) *Hargrave's Law Tracts*, p. 124. *et ſeq.*

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(2.) In the next place it is ſubmitted, that all the authorities, hitherto gleaned, are pointedly againſt conſidering *non-reſident* freemen as citizens within theſe charter exemptions; moſt, if not all of them, excluding even *reſident* freemen, not being alſo *houſeholders* but only inmates or lodgers.

So was it declared againſt *non-reſidents*, by the King with the advice of the Lords in Parliament, in the eleventh of *Henry* the Fourth, on a conſideration of the *London* charter exempting from priſage of wines.—(See *Rotul. Parl.* 11 *Hen.* 4. (*a*) *vol.* 3. *p.* 646.)—*Thomas Chaucer*, who as King's butler had the receipt of the priſage duty, complained to the Lords by petition of groſs abuſe of the *London* exemption from priſage. He repreſented, that this franchiſe was not granted to *London* and the Cinque Ports, " except to the end that thoſe *perſons only who dwell, and* " *by their ſervice become continual dwellers in thoſe places, and* " *their children in the ſaid places born, ſhould have benefit of* " *the ſaid franchiſe*." His petition next ſtated a groſs abuſe of and fraud upon this franchiſe by the city of *London;* namely, that " in the city of *London* it is and has been *uſed of long time*, that " every *foreigner* not free in the ſaid city, who will come to the " mayor, chamberlain, or the maſters of any trade in the ſame " city, and pay a ſmall ſum of money to the chamber, or to the " maſters of any trade of the ſame city, ſhall be received into the " ſaid freedom, as well as he who at all times is a *continual* " *dweller* in the ſame city, *notwithſtanding that he is of another* " *town or borough*, to the *diſinheriſon of our ſaid Lord the King*, " *as well of the priſage* which he ought to have of every " ſuch man not free, *as of all other cuſtoms and duties* to " our ſaid Lord the King alſo from them due." The concluſion of this petition runs thus: " May it pleaſe you to conſider " how the eſtate as well of our Lord the King as of his crown " may be preſerved without deſtruction or prejudice, and thereupon to ordain, that due remedy may be provided in that " reſpect, that is to ſay, by praying our Lord the King and his " very wiſe council to ſend for the mayor and aldermen of *London*, commanding them as well in their own perſons as the " maſters of the different trades of the ſaid city, to ceaſe in future, " *ſo to grant their freedom to any foreigner, under peril of*

(*a*) The paragraph at which this caſe begins is, in the printed copy, marked 73. No number is prefixed to the caſe, but it follows No. xxxii, and is the laſt in the Roll. 11 *H.* 4.—An abſtract may be ſeen in *Cotton's Records*, p. 476.

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" *forfeiture of the franchiſe of the ſame city, and alſo to repeal* " *the freedoms to ſuch foreigners already granted* in any trade " within the ſame city, if they have come to the ſaid freedom in " manner aforeſaid, in regard that otherwiſe in a ſhort time, as " well our ſaid Lord the King who now is, as his heirs, who " ſhould be Kings in future, will be *diſinherited of all their priſage of wine throughout the whole kingdom of* England, *by the* " *freedom of the ſame city of* London." To the petition thus forcibly concluding, the anſwer is as follows: " The King will ſend " for the mayor and aldermen of the ſaid city; and further *has* " *declared* by advice of the Lords in Parliament, that *none hath* " *or enjoys ſuch freedom in this caſe, if he be not a citizen, reſident* and *dwelling within the ſame city;* and that all others " *dwelling in other cities and boroughs, or towns,* &c. have and " enjoy *their own franchiſes* to them granted, ſaving always to " our Lord the King his Inheritance in THIS caſe."—Thus emphatically ſpeaks this famous Parliamentary Record; not to the city of *London* only, but to all other cities and places in the kingdom having like privileges of exemption from priſage and other tolls and duties payable to the crown. All are equally told, that ſuch privileges as well in the caſe of *other* tolls and duties as in the caſe of priſage, are *local*: that they belong to the real *inhabitants* and *dwellers* of the places on which the crown has beſtowed the privilege of exemption: that ſelling or giving the freedom of *London*, or of any other place to perſons reſiding elſewhere, to enable their enjoyment of the ſame privilege, is not only an unavailing abuſe of their power of admitting freemen, but perhaps a fraud upon the crown and its grantees not altogether without dangerous conſequences to thoſe practiſing it: and that *length of time* in practiſing ſuch fraud will not legalize it.

With this parliamentary declaration againſt *non-reſidents*, the language of the Courts of *Weſtminſter-hall* from the moſt ancient times, to which this point about exemption from tolls is traceable, appears to have uniformly accorded. To evince this, it is deemed proper to take a review of the adjudged caſes.

1. The firſt of them is *Knolls*'s caſe in the *Exchequer*, as long ago as the reign of *Henry* the Sixth. It is cited by *Calthrop*, Recorder of *London*, in his book on the Cuſtoms of *London*, pages 34 and 35, where he explains what perſons ſhall be diſcharged under the *London* charter of the firſt of *Edward* the Third, which grants, that no priſage of wine ſhall be taken from the citizens of

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London. In commenting upon the diſtinctions and degrees of citizens, his words run thus: " The firſt is, he that is a citizen of " *London* for the *bearing of offices* in the city, and ſuch *ſpecial* " *intents;* becauſe he is a *freeman* of the city, but not a citizen in " *reſidency* and *continuance* in the city; for he inhabiteth " and dwelleth out of the city. And ſuch a citizen as this is " not ſuch a citizen as ſhall enjoy the benefit and privilege " to be diſcharged of the payment of priſage, according to " the reſolution given in the *Exchequer* in the caſe of one " *Knolls*, *Trin.* 4 *Hen.* VI. *Rot.* 14, where it was ruled, that one " that was a citizen and *freeman of* London, but *dwelt in* Briſtol, " might not partake of the benefit of this charter, inſomuch that " he, *by reaſon of his dwelling out of the city*, was only a citizen " to a *ſpecial intent*." This ſame caſe is cited in 1 *Ro. Rep.* 140. 142. 148, and 149, particularly by Lord Chief Juſtice *Coke*, who refers for it to the *Communia Placita Scaccarii of* 4 *Hen.* VI. Roll. 14 or 18: and by his manner of ſtating the caſe, it appears, that *Knolls* had a *ſhop* and *ſervant* in *London*, and yet was excluded, becauſe *he himſelf did not inhabit there.* Lord Chief Juſtice *Fleming* and Judge *Croke*, in 3 *Bulſtr.* 4. and 9. cite the ſame caſe.

2. The ſecond caſe is the Attorney General againſt *Henry Sacheverell* and *Thomas Snede*, which was adjudged in the *Exchequer* in *Eaſter*, 44 *Eliz.* and began there *Hill.* 43 *Eliz.* It is cited in *Calthrop's London*, 35. Sir *John Davis*'s Reports, fol. 10. *b.* 3 *Bulſtrode*, 5. 1 *Ro. Rep.* 140. 142. 148. and by Lord *Hale*, in his Treatiſe on Ports and Cuſtoms (*a*). According to all theſe accounts of the caſe, the point decided was not merely that *reſidence* was neceſſary to intitle a freeman of *London* to exemption from priſage under the word *cives* in the *London* charter of the firſt of *Edward* the Third, but that he muſt be a *houſholder* alſo, inhabiting as an *inmate* being held inſufficient, becauſe *inmates* are not *full* ſcot and lot men. The moſt pointed account in print of the point in this caſe is by Sir *John Davis*, which being tranſlated, is as follows: " The charter of *London* was allowed in the *Exchequer* of *England*, 44th of *Elizabeth.* But the queſtion there was, if a citizen of *London*, who has not a family, nor pays ſcot and lot, " but ſojourns in the houſe of another, ſhall have the benefit of " the ſaid charter? In the argument of which caſe, *Coke*, then " Attorney General, put this difference of citizens, *viz.* that " there is a citizen *nomine*, a citizen *re*, and a citizen *re et nomine.*

(*a*) *Hargrave's* Law Tracts, p. 128.

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“ But it was reſolved, that only the citizen *re et nomine*, *viz.* he “ who is a *freeman*, and alſo *inhabits* and *pays ſcot and lot* “ there, ſhall be free of priſage by the ſaid charter.” But this caſe being important, the record itſelf has been ſearched for; and from a copy of the record, the caſe appears to have been to this effect:—Sir *Edward Coke*, Attorney General, informed for the Queen againſt *Sacheverell* and *Snede*, for taking and carrying away, and converting to their own uſe, five tons of *Gaſcoyne* wine, the property of the Queen; and the Defendants pleaded not guilty, upon which the caſe went to a jury, who found a ſpecial verdict. In this verdict the charter of the firſt of *Edward* the Third, exempting the citizens of *London* from priſage, is given *verbatim*. It next ſtates, that the Defendants for two years paſt had been freemen of *London*, one being free of the Company of *Haberdaſhers*, and the other of the Company of *Mercers*; and that during the ſame time they were both *abiding*, *lodging*, and *reſident* within the city of *London*, but *without any family or houſhold*. It alſo finds, that they were taxable, and liable to ſcot and lot within *London*, but were never taxed or ſo burthened there. The verdict next ſtates, that they had both taken the oath of a freeman of *London*, which is given at length, and one part of which is expreſſed to be contributory to all taxes ſcot and lot and other charges *as a freeman ought*. Then the verdict mentions, that the Defendants on ſuch a day imported into the port of *London* from foreign parts 52 tons of *Gaſcoyne* wine, and before ſeizure or payment of the Queen's priſage, cauſed them to be landed and to be lodged in a cellar; and that 5 of the tons were ſeized by *Lawrence Smith*, a Queen's officer, for priſage, and afterwards taken from him by the Defendants. It was next found that *for fifty years laſt paſt no citizen or freeman of* London, *inhabiting and reſiding in it as was done by the Defendants, uſed to pay any priſage of wine to the Queen*. But whether on the whole matter the Defendants were guilty, the Jury leave to the Court, aſſeſſing 50*l.* for the five tons, and 10*l.* for coſts againſt the Defendants, if the Court ſhould find them guilty. After this ſpecial verdict there appear to have been ſeveral adjournments by the Court to adviſe upon the matter. But at length, in *Trinity* Term, in the 44th of *Elizabeth*, the Barons gave judgment againſt the Defendants.—From this abridgment of the *Latin* record it is plain, that, according to the ſolemn judgment of the *Exchequer* in this caſe, a freeman of *London*, to have benefit of the exemption from priſage, muſt

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muſt be *not only reſident*, but alſo a *houſholder*. It is alſo apparent that the Court ſo conſtrued *cives* in the charter of *Edward* the Third, in ſpite of an *uninterrupted uſage of fifty years*, found by the jury in favour of reſident freemen being only *inmates* and *lodgers*. Further it is clear, that in the 44th of *Elizabeth* there was not ſo much as a pretenſion to have *cives* in the *London* charter of exemption from priſage, conſtrued as including any freeman without reſidence: and that then the only point was, whether a *freeman* ſhould not be a *houſholder* as well as *reſident*. Nor is this the whole; for the record of this caſe ſhews, that the *oath of a freeman of* London was before the Court; and that notwithſtanding the engagement in that oath to contribute to taxes, and ſubmit to ſcot and lot, but which indeed is qualified by the very ſignificant addition of the words *as a freeman ought*, the Court would not diſpenſe with the *freeman's* being a *reſident houſholder*. Therefore this record exhibits the deciſion of the Court in a ſtronger point of view againſt the extenſion of the privilege to reſident freemen being only lodgers, than any account there is of the caſe in the printed books.

3. A third authority is the caſe of Sir *Thomas Waller*, a patentee or leſſee of the crown for priſage of wine, againſt *Francis Hanger*, in the 9th of *James* the Firſt. It is reported in *Calthrop's London*, p. 2. *et ſeq.* in 1 *Ro. Rep.* 138. in *More* 832. and in 3 *Bulſt.* 1. There is alſo exiſting a manuſcript report of the caſe, in a volume, which is written in an ancient hand, and heretofore belonged to the *Yelverton* library. The caſe is alſo ſhortly ſtated by Lord *Hale* in his Treatiſe on Ports and Cuſtoms (a), and in *Hardr.* 302. and 1 *Sid.* 130. From a copy which has been obtained of the record, it appears, that the caſe is entered *Eaſter* 9 *Jac.* in Roll 163. and that it began in the *Michaelmas* term preceding. It was frequently argued both at the bar and from the bench; and on account of difference of opinion amongſt the judges it ſeems to have at laſt gone off without any judgment. The general point of the caſe is foreign to the preſent purpoſe: for it was, whether the wines of a citizen of *London*, who died, whilſt part was at ſea, and whilſt other part was in the port of *London*, but before bulk broken, were exempt from priſage in the hands of the Defendant, his widow and *executrix*? However, all the reports of the caſe are full of a great variety of matter, ſhewing the neceſſity both of being reſident and of being a houſholder, to qualify a freeman of *London* for exemption from priſage. Even the Defendant's own

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(a) *Hargrave's* Law Tracts, p. 121.

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pleading implied that *inhabiting* within *London* was eſſential to complete the title of citizenſhip for the purpoſe of their exemption; the defendant, as in a former part of theſe reaſons has been ſtated, pointedly alleging the *commorancy* and *inhabitancy* of her huſband, and after his death of herſelf, ſo as to ſhew, that both were *reſident* in as well as free of *London*. The judges and counſel alſo appear to have been unanimous in conſidering actual reſidence as indiſpenſable. Nor is it a little ſingular, that though we have the arguments of two Chief Juſtices and five other judges, and though on other points they differed moſt widely, yet there is not one of thoſe arguments which doth not amplify upon the abſolute neceſſity of being a *reſident houſholder* of *London* as well as a *freeman* to conſtitute the character of *citizen* for the exemption from priſage. Even *Calthrop*, who as Recorder of *London* may be preſumed to have been partial to its claims, in his account of this caſe, is full to the ſame purpoſe. It would be almoſt endleſs to give the variety of phraſes which the Chief Juſtices *Fleming* and *Coke*, and all the other judges ſucceſſively uſed to prove how indiſpenſable they deemed it to the deſcription of *civis*, that the perſon claiming the privilege of exemption ſhould be a *reſiant*, nay, a *houſholder* as well as a *freeman* of *London*. Inſtead of attempting ſo much, it may be ſufficient to give Mr. Serjeant *Moore*'s ſumming up of the arguments of the judges on this branch of the argument. His words, being tranſlated from the law *French*, are theſe. "It was "*reſolved* by *all*, that he who is *civis* and *liber homo* to take the "benefit of this privilege, ought to be *free* of the city, and "alſo an *inhabitant* within the city, and alſo to be a *pater-* "*familias* within the city. For one may be *free* of the city, "and not *civis*; as if he removes and lives elſewhere. He may "be a citizen by *habitation*, and yet *not free*. He may be a *citi-* "*zen* and *free*, and *not a houſekeeper*. And in all theſe caſes he "ſhall not have this privilege." Thus it is proved by this third authority, that in the reign of *James* the Firſt, being an inhabitant houſholder was ſo abſolutely neceſſary to qualify a freeman of *London* for exemption from priſage as a *citizen*, that not even their own law officer and counſel would ſet up a pretenſion to the contrary. It ſhould alſo be attended to, that throughout the numerous arguments in this caſe, there is not any thing like confining this interpretation of *civis* to the ſingle charter of *London* for priſage. On the contrary, there are various ancient authori-

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ties cited to ſhew, that the word *civis* bears the ſame ſenſe, and is underſtood with the ſame reſtriction, in reſpect to other matters and privileges of *London*. A ſhort extract from the manuſcript report in law *French* of this caſe of *Waller* and *Hanger*, will ſerve as an inſtance; for in it *Coventry*, afterwards Lord Keeper, though one of the counſel for extending the exemption to Mrs. *Hanger* the widow, is repreſented as making the following admiſſion to the other ſide. "He is not a *citizen of* London if he is "not a *reſiant* there and taxable to ſcot and lot, 38 *Aſſ*. *pl.* 18. "45 *E.* III. 26. 5 *Hen.* VII. 10. 19. for if he is not reſiant, he "cannot deviſe lands in mortmain," *&c.* (*a*) Another inſtance is the following paſſage from *Bulſtrode*'s Report of Judge *Houghton*'s argument in *Waller* and *Hanger*. After citing one *Oates*'s caſe, from 38 *Aſſ.* and 45 *E.* III. 26. on the *London* cuſtom of deviſing in mortmain, Judge *Houghton* is made to proceed thus: "And there "it is ſaid by *Fincheden*, that citizens ought to have ſuch franchiſes, "*ſcilicet*, thoſe to whom ſuch franchiſes did extend, *ſcilicet*, thoſe "which were born and inheritors in the ſame city by way of herit"age, or which are *reſiants*, and *taxable to ſcot and lot;* and that "*he, which is not ſo, ſhall not be ſaid to be a citizen.*" The ſame judge, after adding other words to explain that a citizen of *London* means one who is *commorant and reſiant*, and ſubject to *ſcot and lot, and liable to ſupply the places and offices there eligible*, ſays, "if he be not ſuch a one, he ſhall not be ſaid to be within "the privilege of a citizen." Lord *Coke* alſo, then Chief Juſtice of the *King*'s *Bench*, is ſtated by *Bulſtrode* to have argued *generally* that a citizen *without reſidence is not, in judgment of law, a citizen*. The whole paſſage, from this part of Lord *Coke*'s argument, is ſo full of pertinent matter, that it deſerves to be here ſtated. According to *Bulſtrode* theſe were his words: "*Civis* is taken five manner of ways in our books. Firſt, *civis* "*re et non reſidentiâ;* and *ſuch a one is not, in judgment of law, a* "*citizen*. And this appears to be ſo by 35 *Hen.* VI. fo. 12. *præ*-

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(*a*) *Vide tamen Bro. Abr. tit. Mortmaine*, *pl.* 35. where the caſe in 38 *Aſſ.* & 45 *Ed.* 3. is thus abridged and commented upon: "*Vide* que nul poit deviſe in mortmaine "in *London* mes ceſtuy que eſt citizen, et nee "et inhabite in *London. Quere indi, et vide* "*librum London* de lour cuſtomes, car ceux "livers *hic* ne ſcient le verity *ut credo*, car "fuit auterment uſe in *London poſt hac, ut* "*dicitur*, mes cheſcun ownor poit deviſe la "al lay home, mes nul poit *doner* in mort"maine, car ceo eſt hors del cuſtome, mes "poit *deviſe* in mortmaine."

"*cipe I. B.* in debt, *civem* Eboraci *non reſidentem* (*a*). 36 *Hen.* VI. "fo. 28. *civi et pannario* Londini, and he did not dwell there: "this is not good; for he may be *pannarius de* London, and yet "dwell at *York*. 4 *E.* IV. fo. 10. where one is *civis de* London, and "dwells in another place. And if this ſufficeth not *in legis eſtimatione, non ſufficit in regis conceſſione.* If he be a *reſident only in* "*name*, this is not good by the 24 *E.* III. fo. 7. 5 *Hen.* VII. "fo. 10 and 19. If he be not a citizen and a freeman, he cannot "by the cuſtom deviſe his lands in mortmain. Alſo if he be but "*inquilinus*, this will not ſerve his turn; but he ought to be a *continuing* citizen, and *reſident*. He ought to have *jus habitationis* "and *jus ſocietatis*. If in the interim he happens to be disfranchiſed, he ſhall not then have the benefit of this diſcharge of "priſage, but he ought to be a continual citizen. And if all theſe "do concur in him, and he continues to be *civis*, then he is every "way complete, and enabled to enjoy the benefit of this grant of diſcharge. *Bracton*, fol. 411. (*b*) comprehends all theſe in one word, "*ſcilicet barones* Londini." Here then Lord *Coke* not only makes the *jus habitationis* and the *jus ſocietatis* both equally eſſential for the *London* diſcharge from priſage; but partly infers it from their being ſo for the privileges of citizenſhip there.

4. A fourth authority is another caſe of priſage; namely, the caſe of Sir *William Waller*, before the Barons of the *Exchequer*, in *Michaelmas*, 4 *Cha.* I. It is given by Lord *Hale*, in his Treatiſe on ports and cuſtoms (*c*), but without the name of the Defendants. There is not any other report of it: and the ſearch hitherto made for the original record has not proved ſucceſsful. However, Lord *Hale* having reported the caſe, puts its exiſtence beyond a doubt. According to Lord *Hale* the general queſtion was, whether the exemption of the citizens of *London*, under the firſt of *Edw.* III. or otherwiſe, did extend to wines imported by them into *Briſtol*, or other the out-ports? Having made this to be the great queſtion,

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(*a*) See the ſame caſe abridged, *Bro. Abr. tit.* Additions, *pl.* 13. The writ was in debt againſt A. B. *civem Eborum*. It was moved to arreſt the judgment on the ſtatute of Additions, (1 *H.* 5. *c.* 5.) becauſe it did not appear in the writ of what place the Defendant was, for he might be a citizen of *York*, and reſide elſewhere. The Court were of opinion, that the objection could only be taken advantage of there by plea in abatement; though if the Derendant had been outlawed, the exception would have been good.

(*b*) *Lib.* 5. *Tract.* 5. *cap.* 14.

(*c*) *Hargrave's Law Tracts*, p. 128.

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he next ſtates, that after ſeveral arguments the Barons, *una voce*, reſolved three ſeveral points. The firſt reſolution was, that by ſpecial words, ſuch as *infrà civitatem vel extrà*, the King might have exempted the citizens of *London* from priſage at the outports. The ſecond was, that for want of ſpecial words, and for other reaſons, the exemption was confined to the port of *London*. The third was, that "*bona civium* muſt not be intended of *every* "*freeman* of *London*;" but that the perſon muſt be, firſt a *freeman* of *London*, ſecondly an *inhabitant* of *London*, and thirdly a *houſholder within the city*. In explanation of this laſt part of the qualification, Lord *Hale* adds, that an *inmate* is not exempt; "Becauſe ſuch a man *contributes not to ſcot and lot*, nor is *beneſi-* "*cial to the city;* and this privilege was granted *intuitû civitatis*, not "*perſonæ;* and the grant being *in diminution of the King's revenue*, "ſhall be conſtrued as ſtrictly as may be, and the word *civis* be "taken in as reſtrained an expoſition as may be." Thus, according to Lord *Hale*, the judges were again unanimous in conſtruing *civis* on the *London* exemption from priſage as meaning, not the *mere freeman*, but a freeman being alſo an *inhabitant houſholder*. Thus, too, this conſtruction was again adopted, upon a reaſon, as applicable to other duties, part of the ancient revenues of the crown, as to the priſage duty; namely, that the exemption granted to the citizens of *London* was founded upon *locality*. A further and auxiliary reaſon is indeed added to the reſolution in this laſt caſe. But that reaſon alſo applies with no leſs force to other ancient crown duties than to priſage; for in both caſes an ancient revenue of the crown is diminiſhed.

5. The next authority applicable is a priſage caſe before the Court of *Exchequer*, on the Equity ſide, in *Michaelmas*, 14 *Cha.* II. whilſt Lord *Hale* was Chief Baron. It was between Sir *William Waller* and *Giles Travers*, and is reported in *Hardr.* 301. but appears more fully from a copy which has been obtained of the decree. The general queſtion in this caſe was the ſame as in Sir *William Waller*'s caſe in the 4th of *Cha.* I. namely, whether the exemption of the citizens of *London* from priſage extends to the out-ports, or is confined to the port of *London*. When the proofs in this cauſe had been taken, and it came on for hearing, and the counſel had been heard, the Court ordered, that a caſe ſhould be agreed on between the counſel on each ſide, and that upon this caſe there ſhould

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ſhould be an argument. Accordingly a caſe was agreed upon, and it is mentioned in the decree, that Sir *Peter Ball* argued for the Plaintiff, and Mr. Serjeant *Hardreſs* for the Defendant. Of the argument of the counſel for the Plaintiff *Waller* there is no report. But Mr. Serjeant *Hardreſs* gives his argument for extending the exemption to the out-ports very much at length, and in it great learning is exhibited. However, the determination of the court was again for the patentee of the crown, and for confining the exemption to the port of *London*; and the Barons appear to have been unanimous; and Lord *Hale*, then Chief Baron, in order to put the queſtion quite at reſt in future, ſeems to have taken great pains in framing the decree; for it not only ſtates the caſe agreed on at length, but particularly enumerates the grounds upon which the Court gave judgment. The general point decided in this caſe is foreign to the preſent conſideration. But ſeveral things are to be collected, which, it is apprehended, bear upon the point of reſidence. Firſt, it appears by *Hardres*'s Report, that the Defendant pleaded himſelf to be not merely a *freeman*, but a *citizen* alſo. Secondly, it appears from the caſe ſtated in the decree, that the Defendant made out his title of citizenſhip by proving, that, at the time of the importation of the wines for which priſage was claimed, he was not only a *freeman* of *London*, but alſo was an *inhabitant dwelling* in the city of *London*, and *did pay ſcot and lot* there. Thirdly, according to *Hardres*'s Report, Mr. Baron *Atkyns*, in his argument, repeated the doctrine of the former caſes as to the neceſſity of being an *inhabitant houſeholder* of *London*, as well as a *freeman*. His words are theſe: "He "that enjoys this privilege muſt be *civis et liber homo*, free of the "city and an *inhabitant* within the city, and a *paterfamilias* too. "If he want any of thoſe qualifications, he is not entitled to "this privilege, as was reſolved in *Hanger's* caſe." Fourthly, it appears from *Hardres*'s argument, that there was *ſtrong evidence* for the Defendant, *of non-payment of priſage by the citizens of* London *at the out ports*: for he ſays, "we have it in "proof, *as far as a negative can be proved*, that priſage has "not been paid for citizens goods, though imported elſewhere "than at the port of *London*." This becomes material for ſhewing that ſuch negative evidence, without ſomething more, will not ſuffice to rule the conſtruction of a charter of exemption, if the ſenſe of the words is clear againſt the exemption claimed.

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claimed. Should any reference be made on the part of *London*, to their having given ſuch negative evidence on the trial in the preſent caſe, it will be material to recollect, that both in this laſt-mentioned caſe of *Waller* and *Travers*, and in the caſe of *Snede* and *Sacheverell* before ſtated from the Record, the exemption was in vain propped up by negative evidence in its favour; in the former, as *Hardres* deſcribes it, by proving non-payment, *as far as a negative is capable of being proved;* and in the latter, by an abſolute proof, as the Record ſpeaks, that there had been *no payment for fifty years laſt paſt.*—Fifthly, there is a paſſage in the decree of this caſe of *Waller* and *Travers*, which ſhews, that both for the ſake of *London* itſelf, and for the ſake of the reſt of the kingdom, the Court thought it their duty not to encourage the leaſt extenſion of the *London* exemption from priſage. For one of the reaſons in the decree is, " that to conſtrue their exemption " to extend unto the wine of the citizens of *London*, imported " by way of merchandize to the out ports, would not only *abate* " *the trade of the city*, but would be a *great prejudice to the trade* " *of wines in general* throughout the kingdom; for that they " ſhould be thereby enabled to underſell other men, and engroſs " the whole trade in the out ports, which cannot be preſumed to " be intended." Now the principle of the firſt branch of this reaſoning, with a little change of words, may be brought to bear in ſome degree againſt the general exemption of non-reſident freemen of *London* from tolls and duties; for to bring non-reſidents within ſuch privilege, is to enable the corporation of *London* and its companies, to deprive its real and compleat citizens of the excluſive benefit intended, by admitting the inhabitants of other ports and places into a participation. Thus in one point of view, even *London* itſelf is intereſted againſt extending their charter exemptions to non-reſidents; for the value of the exemption muſt diminiſh in proportion as the number of participants in it is increaſed. Even the latter branch of the reaſoning of the decree is not wholly inapplicable; becauſe, if non-reſident freemen of *London*, are to be exempt, then *London*, by a partial gift of its freedom to particular perſons, of particular places, may diſcourage trade and commerce in all others, and ſo cauſe a general prejudice.

To thoſe five caſes of priſage, with the accumulation of authority and reaſoning compriſed in them, it is thought proper to add ſome

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ſome extracts from the writings of Lord *Hale*, relative to the ſame ſubject.

In an original manuſcript of Lord *Hale*, intituled, "*Preparatory Notes touching the Rights of the Crown*," where he writes upon exemption from priſage, he thus expreſſes himſelf. "This privilege belongs in general to the city of *London*, by a charter of 1 *E.* III; to thoſe in the Cinque Ports in "reſpect of their ſervice with fifty-ſeven ſhips, and to the ancient "members thereof; and by *Carta Mercatoria* to the *Hanſe* merchants, upon their undertaking to anſwer two ſhillings *per* tun "upon all wines by them imported. But here obſerve, 1. That "no perſon can take the benefit of this privilege granted to *London* and the Cinque Ports, unleſs he be *free*, and alſo *contributory to ſcot and lot*, the grant to *London* being, *quod de vinis civium nulla priſa*, &c. And therefore *Michaelmas* 9 *Jac.* "*inter Waller* and *Hanger*, where a citizen, owner of wines, "died before the bulk broken, it was a great queſtion, whether "the executor ſhould have the privilege or no." This paſſage not only is expreſſed, ſo as to amount to an opinion from Lord *Hale* himſelf, that the exemption from priſage is properly conſtrued to exclude *freemen* of *London* not being actually contributory to ſcot and lot; but extends the ſame opinion to thoſe of the Cinque Ports. The grant of 1 *E.* III. to the Cinque Ports is to the barons of thoſe ports and *their heirs*, which is interpreted to include all freemen of the Cinque Ports. But this extract from Lord *Hale* expreſsly puts them on the ſame footing with the citizens of *London;* not admitting the citizens of freemen of either place, unleſs they are contributory to ſcot and lot there as well as freemen.

In chapter 13 of the ſame manuſcript, which is on the King's power of ordering commerce and trade, Lord *Hale* writes thus: "Thoſe that had an exemption from priſage were,—"1. The "citizens of *London paying ſcot and lot*.—2. Merchant ſtrangers, "who by *Charta Mercatoria* were exempt from priſage paying "butlerage.—3. The barons of the Cinque Ports. *Inter Communia Paſch.* 7 *E.* III. it came in queſtion, whether a merchant alien, being made a freeman of *Sandwich*, was liable to "butlerage or no. It ſeems by the latter opinion he was; be"cauſe it was a ſum due by contract of the merchants aliens in "compenſation of the remiſſion of other duties, or at leaſt that

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“ the mayor and burgeſſes of the port were *fineable for admitting* “ *him to that liberty.* But it is not adjudged.”—Here Lord *Hale* again ſtates the exemption of *London* from priſage, as a privilege confined to the *real* and *compleat* citizens of *London*, to *freemen contributory to ſcot and lot there.*—Something further alſo is brought to light by this laſt extract from Lord *Hale*'s manuſcript. It is, that there may be ſuch a thing as an *abuſe of the power of making freemen*: that there may be a *fraud* upon the crown and the proprietors of ancient tolls under Royal grants, by *making freemen merely to avoid ſuch payment*: and that not only freemen ſo made are excludable from the beneficial privileges aimed at, but perhaps the makers of them are in ſome way or other accountable for abuſing their franchiſe: and ſtill further, that though *London* and other places having like privileges may give or barter away their freedom, ſo far as themſelves and their own intereſts are concerned; yet they may not have the right of ſo acting at the expence of the rights and property of others. In this laſt remark, as to the inefficacy and irregularity of attempting to extend the privileges and exemptions of the citizens of *London* to the inhabitants of other places, there is little more than repetition of the doctrine, which Lord *Hale* himſelf, once more declaring his opinion againſt ſuch an abuſe of franchiſe, has actually and pointedly expreſſed. The paſſage meant is in page 127 of the printed volume containing Lord *Hale*'s Treatiſe on Ports and Cuſtoms (*a*); for theſe are his words explaining the extent of the priſage exemption of the Cinque Ports. “ It doth extend only “ to ſuch as are *truly* members of the Cinque Ports, and pay “ *ſcot and lot there.* And therefore anciently thoſe of the Cinque “ Ports were *fined*, if they did *colourably admit any perſon to be a* “ *freeman of their ports* that was in truth *no inhabitant* there, “ merely to gain the privilege, *viz. ſi advocare voluerint aliquem* “ *de libertate ſuâ eſſe qui non eſt.*”

Upon the whole of this laſt and grand queſtion in the preſent conteſt between *London* and *King's Lynn*, it is ſubmitted for the latter,—that the *London* privilege of exemption from tolls and duties is *local*:—that none but the *real* and *full* citizen, namely, the *freeman* of *London*, being alſo an *inhabitant-houſholder*, or at leaſt an *inhabitant*, is legally participant of ſuch exemption:—that though by being a freeman of *London* a man may become a citizen for *certain intents*, and may as ſuch be ſubject to corpora-

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(*a*) *Hargrave*'s Law Tracts.

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tion offices and certain other duties and payments; yet that no one can be a compleat citizen, a citizen for *all intents*, a compleat ſcot and lot man, a ſcot and lot man for parochial and *other* purpoſes as well as for *corporation* offices and duties, without being an *inhabitant-houſholder* as well as a freeman:—that if the grant of exemption ſhould be otherwiſe conſtrued, inſtead of being merely a grant of exemption to the citizens of *London*, it would be alſo a grant enabling the corporation and companies of *London* to exempt the inhabitants of every place in the kingdom:—that if inhabitancy was not one part of the qualification of a citizen on theſe exemption charters, all the ancient tolls in the kingdom would be from time to time ſaleable and diſpoſable by *London* and every other place having like grants of exemption, to the diſinheriſon of the crown and all deriving title to ſuch property under royal grants:—that the caſes and authorities in reſpect to exemption from priſage of wine are direct authorities, againſt including within other exemptions any but *freemen* being alſo *inhabitant houſholders;* the *London* exemption from priſage being granted for the ſame deſcription of perſons as the *London* exemption from other tolls and duties, and the reaſons for excluding the *mere freemen* being the ſame in both caſes:—that to hold, that *civis* in the priſage charters deſcribed the *full* citizen of *London*, the *freeman* being alſo an *inhabitant-houſholder*, but that the ſame word in the charter for the other exemption deſcribed the *half* citizen of *London*, the *non-reſident* freeman, would be a monſtrous conſtruction without the colour either of language or of principle to ſuſtain the diſtinction:—that the parliamentary record of the 11th of *Henry* the Fourth excludes non-reſident freemen of *London*, as well from the general exemption as from the priſage one, expreſsly repreſenting the miſchief of any other conſtruction as the ſame on both exemptions:—that in all the caſes ſince, there is not ſo much as a hint at a diſtinction between the priſage exemption and the general exemption in this reſpect, there being on the contrary a generality of language embracing both as within the ſame principle of conſtruction:—that, in ſo plain a caſe, any evidence of non-payment by the *freemen* of *London* without regard to inhabitancy ought *now* to be deemed as unavailing in the inſtance of *other* tolls and duties, as it *formerly* was adjudged to be in the inſtance of *Priſage:*—and further, that to permit *London*, through its freedom, to extend its privilege of exemption to the inhabitants of *other places*, would not only be ſubſtituting a toll to the invaders of property for toll to the real pro-

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prietors; but would even be ſacrificing the privileges of *London* itſelf, that is, the privileges of its real and individual citizens, to the lucre of its corporation and trading companies.

To conclude, it is hoped on the part of *King's Lynn*, that the preſent attempt by *London*, to make its freedom ſubſervient to the purpoſe of evading all the ancient tolls of the kingdom, will be condemned as an abuſe of franchiſe equally unavailing and unbecoming; and that the corporation of *London* will be effectually reminded in the language of Lord *Coke* whilſt Chief Juſtice of the *King's Bench*, that—*a citizen without reſidence is not a citizen in judgment of law.*

T. ERSKINE.
S. LE BLANC.
FRAS^s HARGRAVE (*a*).

This caſe was argued at the bar of the Houſe by *Adair* Serjt. and *Gibbs* for the Plaintiffs in Error; and *Le Blanc* Serjt. and *Erſkine* for the Defendants; and the opinion of the Judges was thus delivered by,

EYRE Ch. J.—This is a proceeding founded on the writ *De eſſendo quietum de theolonio*, a proceeding ſo far removed from common uſe, that it has been doubted whether or not it ever prevailed. It is not therefore to be wondered at, if in this attempt to revive it many difficulties ſhould occur; that they ſhould not be of eaſy ſolution; that they ſhould divide the opinions even of learned men. We are called upon to offer our opinion under all theſe circumſtances. It is our duty to obey. We ſhall offer it with the deference due to the opinions of thoſe from whom we may differ. The long and frequent, and able diſcuſſion which the ſubject has undergone, muſt have aſſiſted to throw light upon it—We have this advantage, that we have heard all that can be offered. We have endeavoured to profit by it, and have ourſelves examined the ſubject as fully as the time with which we have been indulged would permit.

The judgment of the Court of *Common Pleas* has been objected to on four grounds:

Firſt, the writ *De eſſendo quietum de theolonio* has been ſuppoſed to be a mandatory and prerogative writ only, the proceedings upon which muſt end with bringing the party into contempt.

Secondly,

(*a*) Theſe reaſons for the Defendants in error are to be found in the Appendix to *Hargrave's* Juridical Arguments, vol. 2; and were drawn up by the learned author of that work. The manuſcript volume of Reports cited *ante* 502, is in the poſſeſſion, and the property of Mr. *Hargarve*: and the manuſcript of Lord *Hale*, intitled "Preparatory "Notes touching the Rights of the Crown," cited *ante* 509, is alſo at preſent in the poſſeſſion of the ſame gentleman.

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Secondly, it is ſaid, that if judicial proceedings can be founded upon it, the citizens of *London*, in their corporate capacity, are not the proper parties to ſuſtain thoſe proceedings. One of the reaſons is, that if toll be taken or even demanded, it muſt be from the individual citizen, and that the injury, if any, muſt be to him, and not to the corporate body; and that the party injured is the only party competent to ſuſtain an action for the injury. And this leads to the

Third objection, that no particular damage to any one is ſtated in the count; that it ſtates only, that the corporation have been diſquieted by the Defendants on the occaſion of the Defendants' demanding toll, and that the Defendants had required certain individual citizens to pay toll: that neither the general allegation of diſquieting, nor the particular inſtance alleged, the requiring the parties to pay toll, amount to damage or to injury, which can be the ſubject of an action. And it is particularly inſiſted on, that nothing ſhort of an actual diſtreſs for the tolls can be the foundation of a proceeding of this nature.

A fourth objection is ſtated, on the ground that freemen of the city, not reſident, not houſholders, not paying ſcot and lot, cannot be entitled to be quit of toll.

We have no difficulty in pronouncing againſt the firſt objection, on the authority of the Regiſter, which is concluſive. The attempt to explain the attachment mentioned in the Regiſter, and to ſhew, that it is merely an attachment for the contempt of the King's writ, fails altogether. It is ſued out by the party complaining. It has not effect until the party has given ſecurity to the ſheriff that he will proſecute his complaint. The words are, "*Si* A. B. *fecerit te ſecurum de clamore proſequendo*"—It does not take the body—"*tunc ponas per vadium et ſalvos plegios*" being an authority only to diſtrain the party by his goods and chattels to compel his appearance, as Sir *Henry Finch* (*a*) treating of actions which concern the realty, has very clearly ſhewn. It follows the *pluries*; which *Fitzherbert*, ſpeaking of the writ *De eſſendo quietum de theolonio* (*N. B.* 227. A.) ſays, is returnable in the *King's Bench* or *Common Pleas* at the will of him who would have it; and this attachment is alſo returnable in a court of common law, where, upon the appearance of the Defendant, the Plaintiff proceeds to count againſt him.

In a word, this attachment is that which is the common proceſs on thoſe writs of right which are the commencement of real actions, not

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(*a*) See Book iv. chap. 2. 4.

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not being pleas of land. The *Monſtraverunt* is one of thoſe real actions. In the Regiſter it is called "*Loquela, quæ eſt coram vobis* "*per breve noſtrum de recto.*" And this form of attachment is the proceſs on that writ.

We find nothing in our books which in any degree countenances this objection, except a paſſage in the ſecond and ſubſequent editions of Sir *H. Finch*'s Diſcourſe on Law, in four books: the paſſage I allude to is in the chapter added to the work, which moſt certainly is not to be found in that place in the original edition in *French*, publiſhed in 1613, with a dedication by the author himſelf to King *James*; and it has eſcaped my ſearch, if it be to be found any where in that work. Probably it might have been found after the death of Sir *H. Finch*, among the collections of that work: and it may have happened, that the officious zeal of an editor has added to the work that which the better judgment of the learned author led him to reject.

If Sir *H. Finch*'s memory is to be charged with a publication, which I take to be ſpurious, I aſk, where did a text writer in the beginning of the 17th century find this doctrine laid down? from what ſources did he collect it? and on what authority does he aſſume as clear law, a propoſition flatly contradicted by the Regiſter, which has always been conſidered as the higheſt authority to which we can appeal in queſtions of this nature, and by *Fitzherbert's Natura Brevium*, a book of little leſs authority? This chapter in *Finch* is as incorrect and unfounded in other particulars as in this of the writ *De eſſendo quietum de theolonio*: for inſtance, it includes among theſe unproductive writs the writ *De corrodio habendo*; which *Fitzherbert* ſtates expreſsly (*N. B.* 231. *A.*) to be a writ, in which there ſhall be an *alias, pluries*, and attachment, if need be. On this firſt point we have never entertaind any doubt.

The ſecond objection is, that the corporation of *London* are not the proper parties to ſuſtain a ſuit grounded on the writ *De eſſendo quietum de theolonio*.

One of the reaſons urged in ſupport of this objection, *viz.* that the corporation can have ſuſtained no damage, I ſhall have occaſion to conſider, when I come to the examination of the third objection: at preſent I have to obſerve, that the right inſiſted upon is a right by preſcription; that it is the body corporate who preſcribe; that there ſeems to be nothing incongruous, and on the contrary there is an appearance of propriety, in making them demandants or plaintiffs in a writ of right, in whom the right is veſted, even admitting the right to be of ſuch a nature, as to be only or principally enjoyed, and fruits of it taken, by the individuals, who compoſe the body corporate: added to which *Fitzherbert* ſays expreſsly, that if any are diſturbed, the corporation may ſue. The paſſage is in *fol.* 227. E. And if any city or borough ought to be quit of toll for the merchandizes which they buy in another town or place, if any of them be compelled to pay toll, *all* the corporation may bring the writ by the name of their corporation, and may have an *Alias* and attachment thereupon, if need be, with theſe words at the end of the writ: "*Et* "*diſtrictionem ſi quam eis eâ occaſione fecerit*, &c."

A paſſage from the Regiſter, under title, *Monſtraverunt*, was thought to countenance this objection. It is the rule (for the author of the Regiſter is a text writer, as well as a compiler of writs,) that when the attachment was to be ſued, the names of the tenants were to be inſerted. But this is explained by the obvious neceſſity of the caſe. In the ſuggeſtion of the writ *Homines* only are named: they are not a corporation, therefore the individuals muſt ſue. In the preſent caſe there is a corporation, and therefore the individuals need not ſue.

If indeed it be true, that there muſt have been an actual diſtreſs, or other poſitive damage to the party ſuing, to give ground for the ſuit (which the third objection goes to), this will not only fortify the ſecond objection, but it will render it unneceſſary to diſcuſs it more particularly, or to decide upon it; for whether the corporation can or cannot be ſaid to have ſuſtained damage by being diſquieted by a demand of toll made on ſome individuals; if damage be the ground-work of the action, the damages having been remitted in this caſe, the ground-work of this action is gone.

But is it a principle founded in the law of *England*, or in general policy (if by that is meant the policy upon which our judicature ſtood in old times) that there can be no action maintained without damage, in the ſenſe in which we underſtand damage in perſonal actions? I conſider it as a ſubordinate queſtion whether that particular damage which ariſes from actual diſtreſs, is eſſential to the ſupport of this particular action by writ of *De eſſendo quietum de theolonio*.

We muſt not enter upon the examination of this queſtion with the prejudices which the eſtabliſhed courſe of proceeding in the common perſonal actions may have created. We muſt look back into the hiſtory of our judicial policy at an early period. We ſhall

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have to conſider the nature and the end of the actions founded in *right* as contradiſtinguiſhed from *poſſeſſion*. We ſhall have to conſider the forms of the ancient proceedings ſimply, and with reference to their object and effect; and by means of that reference to diſtinguiſh between that which is form only and that which is ſubſtance: becauſe however ſacred our old forms may once have been, your Lordſhips are now bound by poſitive law to decide in this ſtage of this cauſe, upon the very *right* of the caſe, to be collected from the whole of this record (if that right can be collected) ſtripped of all the forms with which it is clothed.

The firſt obſervation which the ancient hiſtory of our law ſuggeſts, as applicable on this occaſion, is, that at the common law, in actions founded on the *right*, no damages were recoverable. Damages were firſt given by Stat. 20 *Hen.* 3. in Dower and Quarentine; other ſtatutes have, ſince that time, given damages in other caſes; but many remain at this day in which no damages are recoverable.

If damages were not originally recoverable; if the *right*, and the *right only* was to be recovered by the judgment of the Court; the inference ſeems unavoidable, that damages actually ſuſtained could not be of the eſſence of the action, and that the *right alone* was eſſential.

The queſtion here very naturally occurs, "What buſineſs has a "man in a court of juſtice, who has ſuſtained no damage, let his "right be what it may?" And a ſecond queſtion alſo occurs, "Shall any man be at liberty to drag another into a court of "juſtice, who has done him no injury?"

To the firſt queſtion it may be anſwered, that (without controverting the truth of the propoſition, conſidered as a general propoſition and underſtood in a popular ſenſe, "that no man ſhall "prefer a complaint to a court of juſtice who has ſuſtained no "damage") a man may ſuſtain damage not pecuniary, nor to be recompenced by money.

An extreme jealouſy prevailed formerly, reſpecting all matters of right: many acts entirely unproductive of actual damage, pecuniary in its nature or capable of being recompenced by money, were deemed infringements of right, damage to the right ſufficient to warrant the owner in aſſerting the right againſt the party infringing it, in an action.

Our anceſtors thought that the breath of *calumny* tainted men's rights; and indeed this is to a certain extent the language of our times. The recovery of the right by the judgment of the Court was deemed a proper ſatisfaction for the damage ſuſtained.

To the ſecond of theſe queſtions I anſwer, that great care was taken that no man ſhould come into a court of juſtice without having the right in him: but the protection againſt vexation from unfounded claims was, in the ſpirit of the times, by the amercement *pro falſo clamore*. In a higher ſtate of civilization, and when men's rights are better underſtood, and better protected, we make ſatisfaction to the party dragged into court and called upon to reſiſt an unjuſt demand, by giving him coſts.

It ſeems to have been the policy of former times to open the freeſt acceſs to courts of juſtice, and to offer to all men who had right, the ſanction of the judgments of the courts, for the eſtabliſhment, ſecurity, and preſervation of it.

If the party againſt whom a writ iſſued did not mean to conteſt the right, he diſclaimed; and if he did not come at the very firſt day he was liable to an amercement, though he diſclaimed. Upon the diſclaimer he was not ſimply diſmiſſed, but the demandant had judgment to recover the right. At this day in *Quare impedit* the biſhop diſclaims, that is, claims nothing but as ordinary. The judgment as to the right paſſes againſt him upon his diſclaimer, and there is no inquiry whether or not he did actually interrupt the patron.

Upon examination of the different writs of right, it will be found, that almoſt univerſally, if the right was of a nature to admit of a direct interruption by the act of the party, the writ is formed upon ſuch a ſuppoſed interruption. A diſtreſs taken in contravention of the right is one of the inſtances; but it is to be obſerved, that theſe writs are formularies framed for the purpoſe of bringing the right into diſcuſſion, like thoſe of the *prætor;* and though in *præſcriptis verbis*, from which the ſuitor could not depart without hazard of loſing his writ, there is the moſt direct authority, that in many caſes it was not neceſſary that the act of interruption ſuppoſed by the writ ſhould have actually taken place.

Such was the form in every one of the ſix *Brevia anticipantia*, as Sir *Edward Coke* quaintly calls them. This appears by the precedents in *Raſtall*, under each of thoſe heads, and by the text of *Fitzherbert*. The matter ſo ſtated muſt have been mere ſuppoſal, and a mere formulary, uſed to introduce the matter of right in thoſe caſes. If the writs of *Monſtraverunt*, *Meſne*, and *Ne injuſte vexes* might be ſued before the diſtreſs taken, the *Warrantia chartæ* before

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before the having been impleaded, the *Audita querela* before execution taken out, and the *Curia claudenda* before any damage actually ſuſtained for want of incloſing; of neceſſity the matter of form alleged could not be true. And the obſervation admits not of the anſwer given to it, that though the mandatory writ might iſſue, the remedial writ could not; for in ſome of the caſes there is no ſuch previous mandatory writ, the *Audita querela* for inſtance, and the *Curia claudenda.*

In the courſe of theſe proceedings it has been ſaid, (though I think it was not much preſſed in the argument at your Lordſhips' bar,) that this writ *De eſſendo quietum de theolonio* was included in Sir *Edward Coke*'s enumeration under the head *Monſtraverunt.* I conceive that the foundation of the argument lies deeper; that in a writ the ſuggeſtion of interruption or damage is mere form; and that, whether the writ *De eſſendo quietum de theolonio* is a writ of *Monſtraverunt* or is not, ought to weigh nothing in the argument.

But if it ſhould be thought neceſſary to examine this argument, thus far at leaſt is clear—This writ is intimately connected with the writ of *Monſtraverunt;* it is confeſſedly of the ſame nature, if not the writ of *Monſtraverunt.* Probably it was formed upon the writ of *Monſtraverunt* under the Statute of *Weſtm.* 2. which directs, that where a writ is found in one caſe, and none in another requiring like remedy, the clerks in the Chancery may agree on a writ, or adjourn the Plaintiff to the next parliament, when the writ would be formed under the authority of the King and his council.

I will hazard a conjecture as to the progreſs of this writ *De eſſendo quietum de theolonio* to the maturity in which it is found in the Regiſter. Tolls are, generally ſpeaking, derived from the crown; many of them were part of the revenues of the crown, collected by the bailiffs and officers of the crown. When the crown had granted to any deſcription of perſons to be quit of toll, or they could by law claim to be ſo quit, as was the caſe of tenants in ancient demeſne; if the officers of the crown diſtrained them for toll, it was an obvious remedy to apply for the mandatory writ from the crown to its own officers, and this would moſt frequently be effectual. But when tolls were granted out, and became the private right of other ſubjects, the writ would not be obeyed; the grantees could not in juſtice be concluded by it; there muſt be an appeal to the law. Then, as it ſeems to me, was the courſe of proceeding upon the writ *De eſſendo quietum de theolonio* deviſed upon the plan of a writ of *Monſtraverunt*, as in *conſimili caſu*. It is highly probable that the King's name might have been originally joined with the Plaintiff's in the ſuit, as was formerly the caſe in prohibition: but what a mere form that was, may be collected from the proceeding in prohibition going on very well at this day without it.

If I could go farther than conjecture as to this, I ſhould ſay, that this writ was a writ of *Monſtraverunt* to the purpoſe for which Sir *Edward Coke* has mentioned that writ. Whether it ought to be ſo conſidered or not, and admitting, for the ſake of the argument, that the form of this writ requires that it ſhould be ſtated that the party had been diſtrained upon; ſtill it may be maintained, that this is but form, and that the truth of the fact is not neceſſary to the ſupport of the ground of the action, or to warrant the judgment.

A caſe in the Year-Books 40 *Ed.* 3. *fo.* 45. *b.* will maintain and illuſtrate this propoſition. "*Candiſh* Serjt. demands judgment in "*Monſtraverunt* of the writ, becauſe they have not declared how "they were grieved, whether by diſtreſs, or otherwiſe, nor on "what day. — *Belknap* Serj. We have ſaid, we brought a pro"hibition to you, after which you diſtrained us for other ſervices "and diſtrained the tenants.—*Kirton* J. You ſhould have ſaid "how many beaſts, *for you are to recover* damages; you ſhould "therefore declare how you are damnified.—*Thorpe* Ch. J. By "their ſuit they are to diſcharge the tenancy, as in a *Ne injuſtè* "*vexes* at common law; and for *demanding without more they* "*ſhall have their action*; and if they are not damaged it will "excuſe you from damages. A man ſhall have a writ of *Meſne*, "though he be not diſtrained, and ſhall recover the acquittal *pro* "*loco et tempore;* but he ſhall be diſcharged of the damages; "and ſo ſhall the land here be diſcharged, and you excuſed from "damages."

I need not obſerve to your Lordſhips, that if doubts have at any time been entertained, whether Sir *Edward Coke*'s doctrine in *Co. Litt. fo.* 100. was founded, here is a judicial authority which goes a great way to ſupport it. Indeed it was not likely that he ſhould have broadly ſtated ſuch an enumeration of the *Brevia anticipantia* without ſufficient ground.

There was another caſe cited at the bar from the Year-Books, which went ſtill further to ſupport Sir *Edward Coke*. I may add,

that

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that *Fitzherbert* and Sir *H. Finch* both adopt this doctrine, as to ſome of theſe writs: and if the reaſon for allowing the writ of *Warrantia chartæ* to be ſued out, before the party is impleaded, will ſupport the doctrine as to that one caſe, I need not obſerve to your Lordſhips how that will break in upon the whole train of reaſoning for the defendant in error. Why is a man who has ſubjected himſelf to a warranty, to be dragged into a court of juſtice unneceſſarily, before he has been called upon to perform his engagement; before the Plaintiff has ſuſtained any loſs? Is it juſt that he ſhould be haraſſed by a ſuit which was not rendered neceſſary, for the mere accommodation of the Plaintiff, and to better his ſecurity? The ground which is peculiar to this writ will not bear it out. The foundation muſt be made broader or the edifice will fall.

If diſtreſs, ſuppoſing it to have been alleged in the count, would in a caſe of this nature be deemed matter of form only, your Lordſhips will hardly think it neceſſary to enter into a critical examination of the force of the words "*require to yield toll*," and the difference between requiſition and diſtreſs in this caſe, in which the parties have appeared, and waving all queſtion as to the formal part of the caſe, have joined iſſue upon the right, and there have been a verdict and judgment upon it.

But let this examination be entered into. Diſtreſs, conſidered as the ſubject of a mere perſonal action for damages, is indeed a very different thing from claim and demand; but, conſidered only as it affects the mere right, it differs only in degree. Both impeach the right. And why ſhould not a man who makes a claim againſt my right, be put either to ſupport that claim, if he can, or to renounce it by diſclaimer? Let it be remembered, that claim was conſidered by the common law of this country as a very ſolemn aſſertion of right, and was therefore as often as it interfered with the right of another, conſidered as a very ſerious attack upon that right. As a proof of the firſt branch of this propoſition, I would remind lawyers, that claim prevented a deſcent from tolling an entry; and they will alſo recollect the effect of non-claim in fines, and many other leſs ſolemn caſes. For the latter branch they will find a writ of right grounded altogether upon the adverſary's having made a claim. I allude to the writ of *Quo jure*.

I will give your Lordſhips the trouble of liſtening to *Fitzherbert's* account of the writ of (*a*) *Quo jure*, becauſe I think it very appoſite

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(*a*) *F. N. B.* 128. F. G. I.

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to another part of the argument. "The writ of *Quo jure*—Where "a man hath land in fee, and another claimeth common on that "land, he who owneth that land ſhall have this writ againſt that "commoner who claimeth the common, and the writ is ſuch. "*Rex vic.* &c. *Si* A. *fecerit te ſecurum*, &c. *tunc ſummoneas*, &c. "B. *quod ſit*, &c. *oſtenſurus quo jure exigit communiam paſturæ* "*in terrâ ipſius* A. *ſicut idem* A. *nullam habet communiam in terrâ* "*ipſius* B. *nec idem* B. *ſervitium facit quare communiam in terrâ* "*ipſius* A. *habere debet*, *ut dicit*; *et habeas inde* &c."—"And "this writ is a writ of right in its nature; for when the Plaintiff "hath declared in this writ, the tenant ſhall make defence and "ſet out his title to the common, and allege ſeiſin thereof, "and the *eſplees*, *et quod tale ſit jus ſuum*, *offert*, &c. as the de"mandant ſhall do in a writ of right: and then the Plaintiff in "the *Quo jure* ſhall make defence and deny the ſeiſin alleged by "the Defendant, *and join the miſe upon the mere right*, *or by* "*battail*."

Your Lordſhips perceive, that the only matter of complaint ſuggeſted in the writ was, that the party *claimed a right of common.* But *Fitzherbert*'s account of what was to be done upon this writ goes to the very foundation of this third objection. It plainly evinces, that the ſuggeſtion of the writ was mere form on which nothing turned. The tenant was to ſet out his title; the plaintiff was to deny a ſeiſin and join the miſe upon the *mere right*. To claim liberties and franchiſes without right was uſurpation upon the crown. The writ of *Quo warranto* proceeds upon claim. Claim was always one of the legal modes in which rights were aſſerted in courts of juſtice. Franchiſes were formerly claimed in the *Iter*, they are now claimed in the *Exchequer*. The writ *De libertatibus allocandis* iſſued upon claim made to the juſtices. *Fitz.* 229. B. Your Lordſhips will recollect, that the moſt ſolemn aſſertion of right, which the hiſtory of this country can furniſh, was by *claim* (*a*).

The precedents of writs in the Regiſter are frequently "*quare* "*diſtrinxit*:" but there are ſeveral forms of writs in the Regiſter under the title *Monſtraverunt*, and other titles, where the ſuggeſtion is "*quod exigit*." In *Monſtraverunt* the party is commanded

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(*a*) His Lordſhip probably alluded to the words in the declaration of right recited in 1 *Will.* & *Mary*, *Seſ*. 2. *c*. 2. *viz*. "and they "do *claim*, demand, and inſiſt upon all and "ſingular the premiſes as their undoubted "rights and liberties."

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manded *quod non exigat;* he is required to ſhew *quare exigit.* There are alſo under title *De eſſendo quietum de theolonio* ſome writs in which there is no ſuggeſtion of a diſtreſs. I ought not to omit mentioning, that there are to be found in *Raſtal* precedents of iſſues joined upon the fact of interruption ſuggeſted in theſe writs, I believe, the fact of the taking a diſtreſs. But, in thoſe inſtances, there being no denial of the right, the party had judgment to recover the right. Probably it will be found that thoſe iſſues were offered in caſes where by ſtatute damages might be recovered as well as the right, and that they were offered to protect the party from the damages. However underſtood, they make a clear diſtinction between the right and the accidental pecuniary damages ſuſtained in reſpect of it.

And therefore, neither upon the reaſon or policy of the law, the nature of the remedy, authority in law, or upon precedent, can it be maintained, that the action does not lie, or that the count is bad, becauſe no actual diſtreſs has been taken or even ſtated to have been taken.

The fourth objection remains to be conſidered.

The ground-work of this objection is, that the preſcription to be quit of toll does not extend to mere freemen, non-reſidents, not houſeholders, and not paying ſcot and lot (*a*). If this were ſo, how is the objection upon this record to be ſhaped? Is it an objection in law to the preſcription as laid? or is it the objection that the individual citizens of whom toll has been demanded, are not brought within the preſcription as laid? There is no opening for the objection in either way upon this record.

The ſtrongeſt way of putting it (if the act of parliament for confirming the cuſtoms, &c. of the city does not ſtand in the way) is, as an objection to the preſcription as laid, becauſe the verdict would be no protection againſt an objection ſo ſtated; and the particular ground of objection would be, that a preſcription for all citizens without reſtriction or qualification is unreaſonable and void. But if Sir *Edward Coke*'s opinion, as ſtated by *Bulſtrode*, is well-founded, that a citizen without reſidence is not in judgment of law *civis*, then the *cives* in the preſcription muſt mean citizens reſident; and the averment that the ſeveral perſons of whom toll was

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(*a*) In a ſubſequent caſe of The Corporation of *London v.* The Corporation of *Liverpool*, which was tried at bar in the Court of *Exchequer* in *Eaſter* Term 1799, the jury, under the direction of the Court, found that a freeman of *London* is not exempt from toll, unleſs he be reſident, inhabitant, and in ſcot and lot.

was demanded were *cives*, is tantamount to an averment that they were citizens reſident, which removes all objection.

If *civis* is in judgment of law a mere general term, we have not heard upon what grounds of law it is to be argued without the aſſiſtance of facts which are not upon this record, that the preſcription cannot extend to citizens in the largeſt ſenſe of the word which the law will adopt. It muſt be firſt accurately defined what is a citizen; and then it would be to be conſidered, whether all perſons of that deſcription were in judgment of law capable of taking the benefit of the preſcription: and that muſt be reſolved in the negative, before the objection to the preſcription as laid, could ariſe; all which may perhaps be matter for very ſerious diſcuſſion hereafter. At preſent I ſhall content myſelf with obſerving, that the authorities in the caſe of priſage ſeem to have no neceſſary application to the right to be quit of tolls, except as far as they go to maintain Sir *Edward Coke*'s poſition, that a citizen without reſidence is not in judgment of law a citizen; which, for the reaſon I have given, will not aſſiſt the objection to the preſcription as laid.

As to the practice of ſelling the freedom, and conſequently ſelling the franchiſe, and defrauding the crown and its grantees of their rights, it is an anſwer to ſay, that upon this record, out of which we muſt not travel, it does not appear, nor can we take notice, that the freedom can be ſold, or that it has been ſold to the perſons deſcribed as citizens upon this record. The facts therefore, out of which the objection in law is to ariſe, are not before your Lordſhips.

In this and in other reſpects, it ſeems to be a mixed conſideration of fact and of law, and for inquiry by the jury what ſort of citizens were to have the benefit of this preſcription; as it certainly would be, whether the individuals had the qualification which the preſcription required. Iſſues having been joined upon both points, and the jury having decided upon them, and the facts upon which they have decided not being before your Lordſhips, we cannot adviſe your Lordſhips to enter further into this fourth objection.

This attempt to revive a courſe of proceeding, which if not obſolete, has certainly for a long time gone into diſuſe, has been the ſubject of ſome animadverſion. This however may be ſaid for it; that it has conducted the parties by a very ſhort road indeed, if we compare this record with our modern pleadings, to iſſues upon what the parties underſtood at the time to be the very

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right in diſpute with them, free from all the embarraſſments which forms and words are too apt to create. And I muſt ſay, that if theſe writs of right could be proſecuted without the delays in proceſs, eſſoigns, *&c.* with which they are burthened, it would be much for the benefit of the ſuitors that more of them ſhould be introduced into practice.

Upon the whole of the caſe I conclude, and am now to offer to your Lordſhips the unanimous opinion of the Judges, that the matter in this record was ſufficient to entitle the original Plaintiff in the action to recover.

After hearing the opinion of the Judges, the Houſe, on the motion of the Lord Chancellor, reſolved, that the judgment of the Court of *King's Bench* ſhould be reverſed, and the judgment of the Court of *Common Pleas* affirmed.

May 9th.

CLIFTON *v.* GERRARD.

Under a covenant by a leſſee of a coal-mine to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhall ſell for at the pit's mouth*, the leſſee was held liable to pay a moiety of the money which the coals, though ſold elſewhere, would have produced at the pit's mouth.

THIS was a demurrer to a declaration in covenant, and the queſtion was, Whether under a demiſe of a coal-mine at a certain yearly rent "and alſo one-half part or ſhare of all ſuch "ſums of money as all or any part of the cannel to be gotten by "virtue of the ſaid indenture *ſhall ſell for at the pit's mouth* over "and above 4*d.* the baſket" the Plaintiff (*a*) was entitled to claim one half of ſuch ſums of money as had been produced by the ſale of the cannel *at other places than at the pit-mouth*, it being averred that the cannel, if ſold at the pit-mouth, would have produced above 4*d. per* baſket? (See the record at length upon Error 7 *Term Rep.* 676.)

The opinion of the Court was this day delivered by

EYRE Ch. J. We all agree that it may be collected from the whole of the deed taken together, upon which this action is brought, that it was intended that a proportion of the profit upon all coals, not being refuſe coals, which ſhould be raiſed from the collieries demiſed, ſhould go to the leſſor, the owner of theſe collieries. The queſtion between us has been, whether the parties have uſed the proper and effective means to carry this intention into execution? The ſtipulation is, that the leſſor ſhall receive a certain proportion of the price which the coals raiſed ſhall ſell for at the pit's mouth. Probably all the coals raiſed were, at the time when

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(*a*) There were originally two Plaintiffs, but the death of one was ſuggeſted on record before judgment.

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this leaſe was made, ſold by thoſe who raiſed them at the pit's mouth, and as long as they continued to be ſo ſold, the proviſion for ſecuring to the leſſor his proportion of the profits would be ſufficient. In point of fact, large quantities of the coals raiſed have for ſome years laſt paſt not been ſold at the pit's mouth, but have been ſold at other places by thoſe who raiſed them. My Brothers are of opinion, that the change of circumſtances ſhould not be allowed to defeat the intent of the deed, and that to effectuate that intent the words "ſhall be ſold for at the pit's mouth" may be conſtrued to mean "ſhall be worth to be ſold at the pit's mouth," and I agree with them in thinking, that if the words were capable of that conſtruction, there might be an averment what the coals were worth to be ſold at the pit's mouth, and that the proportion of the profit to be rendered to the leſſor might in that manner be aſcertained, and that this would ſupport the preſent action. The point upon which I differ from my Brothers is this: I am apprehenſive that the words "ſhall ſell for at the pit's mouth" will not bear out the conſtruction which is put upon them. I am quite ſatisfied that the parties did not mean to uſe them in ſuch a ſenſe, but on the contrary, they uſed them in their plain and obvious ſenſe, in which the terms of the covenant are adapted to that mode of ſelling the coals raiſed which prevailed when the leaſe was made. I believe the ſubſtantial juſtice of the caſe will be reached by the opinion which my Brothers have formed upon this deed, and I can only add, that I am ſorry I cannot ſatisfy myſelf to ſubſcribe to it.

Per Curiam. Judgment for the Plaintiff (*a*).

(*a*) This judgment was reverſed upon error in the *King's Bench.* See 7 *T. R.* 676.

CURRY *v.* WALTER.

An action cannot be maintained for publiſhing a true account of the proceedings of a court of juſtice, however injurious ſuch publication may be to the character of an individual.

Quære, Whether the matter of juſtification ought not to be pleaded?

THIS was an action for printing and publiſhing in the newſpaper called "The Times," under the title of "Law Reports," a libel on the Plaintiff. It imported to be an account of an application to the Court of *King's Bench* for an information againſt the Plaintiff and a Mr. *Bingham*, both juſtices of the peace for *Hampſhire*, for refuſing to licenſe an inn at *Goſport*.

The ground of the application, as moved by Mr. *Erſkine*, was that the magiſtrates had conſpired with the landlord of the inn-keeper to find a pretence for refuſing him a licence, thereby to compel him to ſurrender a very beneficial leaſe to his landlord. The ſuppoſed libel, which was ſet out *verbatim* in the declaration, ſtated the circumſtances of this charge very diſtinctly, and concluded by ſhewing that the rule was not granted, becauſe there was no affidavit on the part of the proſecutor of the magiſtrates having had due notice of the motion. The Defendant pleaded the general iſſue, and at the trial, after the Plaintiff had proved the publication of the paper in queſtion by him, produced as witneſs a perſon whom he employed to collect legal intelligence for the uſe of his paper, in order to prove that the report was a true and faithful account of what paſſed in the Court of *King's Bench* upon the motion. It was objected on the other ſide, that this defence ought to have been put upon the record, and could not be given in evidence under the general iſſue. This objection however was overruled by *Eyre* Ch. Juſt. who in ſumming up, told the Jury, that though the matter contained in the paper might be very injurious to the character of the magiſtrates, yet he was of opinion, that being a true account of what took place in a court of juſtice which is open to all the world, the publication of it was not unlawful. The Jury found a verdict for the Defendant.

A rule *Niſi* for ſetting aſide this verdict having been obtained on a former day, upon two grounds, 1ſt, That the matter given in evidence did not amount to a defence in law; and 2dly, That ſuppoſing it to be a good defence it ought to have been pleaded in bar to the action, and not received in evidence under the general iſſue;

Le Blanc Serjt. now ſhewed cauſe. There are two points to be conſidered: Firſt, whether the Defendant was at liberty to give in evidence under the general iſſue, that the account of the caſe publiſhed was a true account? Secondly, whether at all events it is not a libel to publiſh what did actually paſs in court, if injurious to the character of the Plaintiff? It may be admitted, that a Defendant cannot juſtify an aſſertion on the ground of its being true, without ſpecially pleading ſuch juſtification. But in this caſe the libel was not juſtified as true, but evidence was merely called to ſhew that the account publiſhed in *The Times* was a true account of what paſſed in the *King's Bench*. Many caſes may be cited to ſhew that the Defendant is entitled to prove the occaſion of ſpeaking particular words. As in the caſe of giving the character of a ſervant: which was ſo ruled by Lord *Manſfield* at *Niſi*

Prius (*a*). Or if a man repeat an injurious aſſertion expreſſing his concern of its having been made by another, and without any intention of doing an injury himſelf (*b*). In *Cro. Jac.* 90. a caſe is cited of a clergyman, who in his ſermon quoted a paſſage from *Fox's Book of Martyrs*, ſcandalizing a perſon then preſent; on action brought againſt him, and the general iſſue pleaded, he gave the matter in evidence, and it was held that "it being delivered "but as a ſtory and not with any malice or intention to ſlander "any, he was not guilty of the words maliciouſly." So it is not actionable for one to tell another confidentially not to truſt a tradeſman: for it is only by way of counſel. *Vanſpike* v. *Cleyſon*, *Cro. Eliz.* 541. The ſame doctrine was laid down by *Pratt*, Ch. J. in the caſe of *Herver* v. *Dawſon*, Sittings after Term, 5 *Geo.* 3. *C. B. Bull. N. P. p.* 8. edit. 2. If the account publiſhed by the Defendant be a libel, no man can report a caſe decided in a court of juſtice reflecting upon the character of another. Suppoſing the facts contained in the affidavits on which the motion in the *King's Bench* was founded to be falſe, the deponents are liable to be indicted. A counſel is juſtified in ſtating what appears in his inſtructions, but he muſt not go out of his (*c*) way to vilify. In this tranſaction nothing of that kind appeared. The Defendant therefore might lawfully report what the counſel might lawfully ſay.

Adair and *Marſhall* Serjts. *contrà.* 1ſt, The matters given in evidence did not amount to a defence in law. 2dly, If they did, they ought to have been pleaded. It may be admitted, that the parties, counſel and witneſſes in a cauſe are exempt from an action of ſlander, provided the allegations be made in a court of competent juriſdiction, and be pertinent to the cauſe, *Waterer* v. *Freeman*, *Hob.* 266; *Weſton* v. *Dobniet*, *Cro. Jac.* 432.; and *Aſtley* v. *Younge*, 2 *Burr.* 807. It has been held, that *ſcandalum magnatum* would not lie for bringing an unfounded charge of forgery againſt a peer, becauſe the charge was exhibited in a court of juſtice. Lord *Beauchamp* v. *Sir R. Croſt*, *Dy.* 285, *a*. For the ſame reaſon an action will not lie for a falſe charge before a juſtice of the peace. *Ram* v. *Lamley*, *Hut.* 113. and *per cur. Cro. Jac.* 432. or for a falſe charge in a plea. *Ibid.* So no action lies againſt a witneſs for a falſe charge. *Harding* v. *Bodman*, *Hutt.* 11. *Brownl.* 2. S. C. and *Buckley* v. *Wood*, *Cro. Eliz.* 230. So a counſel is not liable for falſe and injurious words, though not preciſely pertinent to the iſſue, if they were in mitigation of damages,

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(*a*) *Edmondſon* v. *Stevenſon* & *Ux.* Sitt. *Weſtm.* after *E.* 6 *Geo.* 3. *K. B. Bull. N. P. p.* 8. ed. 2. The doctrine of the above caſe was expreſsly recognized in *Weatherſton* v. *Hawkins*, 1 *Term Rep.* 110.

(*b*) 1 *Lev.* 82.

(*c*) *Brook* v. *Montague*, *Cro. Jac.* 90.

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and he ſpoke them by inſtruction of his client. *Brooke* v. *Montague*, 1 *Roll. Ab.* 87. The reaſon of the privilege in the above caſes is that the ſuit is legal, though the foundation of it is falſe; and Lord *Coke* ſays, 4 *Rep.* 14, *b.* "If actions ſhould be permitted "in ſuch caſes, thoſe who have juſt cauſe of complaint would not "dare to complain for fear of infinite vexation." Beſides "there "can be no ſcandal if the allegation be material, and if it is not, "the Court before whom the indignity is committed by im"material ſcandal, may order ſatisfaction and expunge it out of "the record, if it be upon the record." *Per* Lord *Manſfield*, 2 *Burr.* 810. This privilege however being *ex neceſſitate* has always been conſtrued ſtrictly and confined to the above caſes. If a man exhibit a falſe charge in a court which has no juriſdiction, as ſelony in the *Star-Chamber*, *Buckley* v. *Wood*, 4 *Co.* 14, *b.* *Cro. Eliz.* 230. S. C. and *Hob.* 267. or an appeal of murder in the *Common Pleas*, 4 *Co.* 15. it is actionable. It appears alſo that a falſe charge, though made in a court of competent juriſdiction, *if talked of elſewhere at large is libellous*, 4 *Co.* 14, *b.* (*a*) and Juſtice *Crook*'s caſe, *March.* 76 (*b*), and this has been expreſsly held of a petition to the King containing ſlanderous matter. *Hare* v. *Miller*, 3 *Leon.* 138. and of a petition to the *Houſe of Commons.* *Lake* v. *King*, 1 *Saund.* 132. (*c*) 1 *Lev.* 240. S. C. 1 *Sid.* 241. S. C. and of the publication of proceedings in prohibition. *Waterfield* v. *The Biſhop of Chicheſter* (*d*), 2 *Mod.* 118. Lord *Manſfield* often mentioned that Lord *Hardwicke* granted an attachment againſt an attorney who publiſhed his brief after the trial of a cauſe, deeming it a libel. There was alſo an action in this court againſt the preſent Defendant, for publiſhing an account of a trial in the *King's Bench* before Lord *Kenyon*, in which ſome ſevere animadverſions made by his Lordſhip upon the Plaintiff were ſet forth; and Lord *Loughborough*, before whom it was tried, held it a libel, and a verdict was found for the Plaintiff. The late caſe of *The King* v. *Lord Abingdon*, *Eſp. N. P. Caſ.* 226. is an authority on this point. There it was held that a publication by the Defendant of a ſpeech which he had made in the *Houſe of Lords* containing ſlanderous matter, was a libel. The only diſtinction that can be taken between the caſes, is, that the preſent Defendant is not as the Defendant in that caſe was perſonally intereſted in, or party to

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(*a*) *Sed quære*, if that caſe warrants this deduction?

(*b*) *Vid. etiam Rex* v. *Saliſbury*, 1 *Lord Raym.* 341.

(*c*) In the notes on this caſe by Mr. Serj. *Williams*, in his late learned edition of *Saunders*, both the points inſiſted on by *Adair* and *Marſhall* Serjts. are very fully diſcuſſed.

(*d*) *Sed vide* what is ſaid of this caſe by *Lawrence* J. 8 *Term Rep.* 297., who ſhews that the charge againſt *Waterfield* was for publiſhing a falſe account of the proceedings.

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the original ſcandal, and therefore no malice can be inferred whereon to found a criminal proſecution. But this will not deprive him of his civil remedy; for in a declaration for ſlander *falsò dixit* without *malitiosè* has been held ſufficient. *Mercer* v. *Sparkes*, *Ow.* 51. *Noy* 35. S. C. and *Moor* 459. *Anon.* Copying a ſcandalous matter is according to Lord *Holt* ſufficient to conſtitute a libel, for it perpetuates the memory of the ſcandal; though if the copy be made by a clerk in writing an indictment, or a ſtudent a note, it is not ſo, becauſe not done *ad infamiam.* *Rex* v. *Beare*, 1 *Ld. Raym.* 417. 2 *Salk.* 417. 12 *Mod.* 220. It is now perfectly ſettled that every one is anſwerable for the ſlander which he reports of another. *Per* (*a*) *Lee* Ch. J. *G. Hall* 1751. *Bull. N. P.* 10. *Ed.* 2.

With reſpect to the ſecond point, it will be neceſſary to conſider the allegation in the declaration. The libel purports to be an account of what paſſed in the Court of *King's Bench*, and it was not ſtated that the Plaintiff and Mr. *Bingham* did what was there aſcribed to them, but that certain things were there aſcribed to them. The truth of this account therefore, not the truth of the facts ſtated ſhould have been ſpecially pleaded in juſtification. The general iſſue is either a denial of the publication, or that if publiſhed by the Defendant, the words are not actionable. The rule is, that where the Defendant admits the publication, and that the words are ſlanderous, but means to juſtify under the occaſion of their publication, he ſhould plead that juſtification ſpecially, in order that the Plaintiff may have notice of the nature of the defence. *Underwood* v. *Parks*, 2 *Str.* 1200. This was done in *Brook* v. *Montague*, cited on the other ſide, where the Defendant pleaded that he ſpoke the words imputed to him *as counſel*, and in *Aſtley* v. *Younge*, that the ſcandalous matter was contained in an affidavit made by the Defendant in the *King's Bench* in his own defence. The preſent differs materially from the caſes relied on, *viz.* of a miſtreſs giving in evidence her being called on for a character of a ſervant, and of a friend having ſpoken of a tradeſman's credit by way of advice; in thoſe caſes the parties uttering the imputed ſcandal had a duty to fulfil, which this Defendant had not.

The Court were of opinion that this action could not be maintained, but ſome doubts being entertained upon the bench whether the matter of juſtification ought not to have been pleaded, the caſe ſtood over; and no judgment was ever given (*b*).

(*a*) *Vid. etiam Davis* v. *Lewis*, 7 *Term Rep.* 17.

(*b*) See the reference to this caſe made by *Lawrence* J. in his judgment on the caſe of *The King* v. *Wright*, 8 *Term Rep.* 298.

REGULÆ GENERALES.

IT IS ORDERED, That from and after the laſt day of this preſent Term, no fines which ſhall appear to have been acknowedged more than twelve calendar months, ſhall be permitted to paſs the *King's Silver Office* without a rule of the Court, or an order under the hand of the Lord Chief Juſtice or ſome other Judge of this Court; and that where the conuzor or conuzors ſhall be all living at the time of making the application for ſuch rule or order, an affidavit ſhall be made thereof. And in caſe any or either of the conuzors of ſuch fine ſhould not then be living, an affidavit ſhall be made ſtating the time of the death of ſuch conuzor or conuzors, and the application in ſuch caſe for a rule or order that the ſaid fine may paſs the *King's Silver Office* ſhall be made to the Court by motion, if in Term time, or if in Vacation to the Lord Chief Juſtice or ſome other of the Juſtices of this court, at his chambers; and that the rule or order in ſuch laſtmentioned caſe, when obtained, ſhall be filed with the *præcipe* and concord of the fine, at the *King's Silver Office*.

By the Court,

JA. EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

IT IS ORDERED, That from and after the firſt day of the next Term, in all actions requiring bail, the Defendant ſhall not be permitted to enter into the recognizance; but the bail ſhall each of them enter into a recgnizance of double the ſum ſworn to.

By the Court,

J. EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

In this term *Samuel Shepherd* of the *Inner Temple* Eſq. was called to the honourable degree of Serjeant at Law, and gave rings with this motto,

"*Legibus Emendes.*"

END OF EASTER TERM.

CASES
ARGUED and DETERMINED
IN THE
Court of COMMON PLEAS
IN

Trinity Term,

In the Thirty-ſixth Year of the Reign of GEORGE III.

DOE on the ſeveral demiſes of POTTER and Others *v.* ARCHER and Another.

June 1ſt.

Tenant for life leaſes premiſes for 21 years, and before the expiration of that term dies; the truſtees of the remainder man, then an infant, continue to receive the rent reſerved, and he, on coming of age, ſells the premiſes by auction; in the conditions of ſale the premiſes are declared to be ſubject to the leaſe, and in the conveyance to the purchaſer the leaſe is referred to as in the poſſeſſion of the leſſee; and in the covenant againſt incumbrances, that leaſe is excepted; the purchaſer mortgages, and in the mortgage deeds the like notice is taken of the leaſe, and the mortgagees for ſome time receive the rent reſerved; held that the leaſe expired with the intereſt of the tenant for life, and that the notice ſince taken of it did not operate as a new leaſe.

THIS ejectment, for certain premiſes in the pariſh of *Tottenham* in the county of *Middleſex*, came on to be tried before *Eyre* Ch. J. at the ſittings after *Hilary* Term 1796, when a verdict was found for the Plaintiff, ſubject to the opinion of the Court, upon the following caſe:—

Francis Bowyer being ſeized of the tenements and premiſes in the declaration mentioned, in his demeſne as of fee, by his will, dated the 21ſt of *January* 1779, duly executed and atteſted as the law requires for paſſing real eſtates, deviſed the ſaid tenements and premiſes unto his nephew *Thomas Bower* for his life; remainder to *Thomas Elde*, *Stephen Martin Leake*, and *William Whitaker*, in truſt to preſerve contingent remainders; remainder to *Thomas Bowyer Bower* (the ſon of *Thomas Bower*,) for his life, remainder to the heirs male of the body of *Thomas Bowyer Bower*, remainder to the younger children of the ſaid *Thomas Bower*, and remainder to the right heirs of *Thomas Bower* for ever. The ſaid teſtator afterwards died without revoking or altering his ſaid will, ſo ſeized of the ſaid tenements and premiſes with the appurtenances; by virtue whereof the ſaid *Thomas Bower* entered and became ſeized of the ſaid tenements for his life. And being ſo ſeized by indenture of leaſe, made on the 25th of *September* 1784, between the ſaid *Thomas Bower* of the one part, and *Thomas Archer*, ſince deceaſed, of the other part, and bearing date the ſame 25th *September* 1784, the ſaid *Thomas Bower* demiſed unto the ſaid *Thomas Archer*, his executors, adminiſtrators, and aſſigns, the ſaid tenements and premiſes, to hold the ſame unto the ſaid *Thomas Archer*, his executors, adminiſtrators, and aſſigns, from the feaſt of *St. Michael the Archangel* next enſuing the date thereof, for the term of *twenty-one years* then next following, at the yearly rent of 90*l.*, payable half yearly, as therein mentioned; by virtue whereof the ſaid *Thomas Archer* entered and was poſſeſſed thereof. In the month of *January* in the year 1790, *Thomas Bower*, the landlord, died, leaving *Thomas Bowyer Bower*, his ſon, then an infant; and the ſaid truſtees named in the ſaid will received the half year's rent from the ſaid *Thomas Archer*, which became due at *Lady-day* 1790, according to the terms of the ſaid leaſe, and continued to receive the ſame rent, as reſerved by the leaſe, half yearly, until *Michaelmas* 1792, at which time the ſaid *Thomas Bowyer Bower* (having attained his age of 21 years in the month of *April* in the ſame year, and having previouſly, and after he came of age, ſuffered a recovery thereof, and declared it to the uſe of himſelf in fee,) ſold the ſaid premiſes to *Samuel Potter* by public auction. In the conditions of ſale by which the premiſes were ſold to the ſaid *Samuel Potter*, it was declared that the ſale was *ſubject to the ſaid leaſe to the ſaid Thomas Archer*, and the conveyance to the purchaſer was by indentures of leaſe and releaſe, dated and made reſpectively on the 20th and 21ſt *November* 1792. The releaſe of three parts, between *Thomas Bowyer Bower* of the firſt part, *Thomas Smith* Eſq. of the ſecond part, and *Samuel Potter*, linen-draper, of the third part; after reciting that the ſaid *Thomas Bowyer Bower*, on the 6th *July* laſt, did cauſe the meſſuage or tenement and farm aftermentioned, with the appurtenances, to be put up to ſale by public auction at *Garraway's*, *ſubject to the leaſe therein after mentioned*, and to a fee farm or quit rent of 2*l.* 10*s.* payable thereout to the ſaid *Thomas Smith*, as lord of the manor of *Tottenham*; that at ſuch ſale the ſaid *Samuel Potter* bid for, and being the higheſt

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bidder, was declared the purchaſer thereof (*ſubject as aforeſaid*), at the price of 3,220*l.* excluſive of the timber, which was to be taken at a fair valuation; and that the timber had ſince been valued at 146*l.* 5*l.* 2*d.* and that Mr. *Potter* had alſo agreed with Mr. *Smith* for the purchaſe of the fee farm rent for 75*l.*; witneſſed, that in conſideration of the purchaſe monies paid in manner therein mentioned, the ſaid *Thomas Bowyer Bower* and *Thomas Smith* did convey the ſaid meſſuage or tenement and farm, and the ſaid quit rent by the deſcription therein mentioned; *all which ſaid premiſes were then in the tenure or occupation of* Thomas Archer *or his aſſigns, at and under the yearly rent of* 90l.; *and were under leaſe to him for a term of* 21 *years, which would expire at* Michaelmas *day* 1805, together with the appurtenances, to hold the ſame unto and to the uſe of the ſaid *Samuel Potter*, his heirs and aſſigns, for ever, diſcharged of the ſaid quit rent of 2*l.* 10*s.* Mr. *Bowyer Bower*, by the ſaid indenture, alſo entered into the uſual covenants of a ſeller; and in the covenant for peaceable enjoyment, the rents and profits were to be received by the purchaſer from the 29th *September* then laſt; and in the covenant againſt incumbrances, *the ſaid leaſe to the ſaid* Thomas Archer, *for the term of* 21 *years, which would expire at* Michaelmas 1805, *was excepted.* By indentures of leaſe and releaſe, dated and made on the 22d and 23d *November* 1792, the above premiſes were mortgaged by the ſaid *Samuel Potter* to *Benjamin Fuller*, *Matthew Hancock*, and *Richard Shaw*, Eſqrs. for ſecuring 2000*l.* and intereſt; and in the deſcription of the parcels, and the covenant againſt incumbrances there was the *like notice taken of the leaſe to the ſaid* Thomas Archer *as in the conveyance to the ſaid* Samuel Potter. The abovementioned mortgagees have been in receipt of the rents ever ſince their mortgage, and have received the ſame of *Thomas Archer* the leſſee half yearly at *Lady-day* and *Michaelmas* down to *Michaelmas* 1793. The Defendants are the perſonal repreſentatives of the ſaid *Thomas Archer* deceaſed, and as ſuch are in the poſſeſſion of the premiſes. On the 24th day of *March* 1795, a notice ſubſcribed by the leſſors of the Plaintiff, *Richard Shaw*, *Samuel Potter*, *Benjamin Fuller*, and *Matthew Hancock*, was ſerved on the Defendants, by which notice they were required to deliver up the poſſeſſion of the ſaid premiſes on the 29th day of *September* then next. Under theſe circumſtances, the queſtion reſerved for the conſideration of the Court was, Whether the Plaintiff was entitled to recover poſſeſſion of the ſaid premiſes? And if the Court ſhould be of opinion, that he

was,

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was, then the verdict to ſtand, and judgment to be entered thereon for him; but if the Court ſhould be of opinion that the Plaintiff was not entitled to recover, then a nonſuit to be entered.

Heywood Serjt. for the Plaintiffs. It has been repeatedly decided, that where tenant for life leaſes for a term, the leaſe expires with his life. *Doe* v. *Butcher*, *Doug.* 51. *Roe* v. *Ward*, 1 *H. Bl.* 97. If the Defendants mean to rely on the recitals in the indentures, the caſe in *Bendloe's Reports* (*a*), *pl.* 13. may be referred to, where it was held, that a leaſe which had been forfeited to the crown, could not be ſet up by a reference to ſuch leaſe, in another leaſe from the crown, to a third perſon, to commence from the expiration of the term of years for which the forfeited leaſe was granted.

Williams Serjt. for the Defendants. I admit the doctrine laid down in the caſes cited from *Douglas* and 1 *H. Blackſtone*, but I contend, that it is not neceſſary to the creation of a leaſe, that the leſſee ſhould be a party to the inſtrument by which it is created. If one grant a leaſe to *A.* by deed poll, *A.* will not be a party to the deed. The releaſe of *November* 1792 amounts to a new grant; for after reciting the ſale of the premiſes, and the reſervation of the fee farm rent, it witneſſes that in conſideration of the purchaſe money, the vendor conveyed ſubject to the leaſe of the Defendant. The leaſe therefore is not merely mentioned in the recital, but in the operative part of the deed: and the party by the expreſs terms of it took a new leaſe, to run from the date of the deed to *Michaelmas* 1805. The vendor and vendee both meant the leaſe to have exiſtence, and the latter taking, ſubject to the leaſe, paid for the premiſes accordingly. If this was the intent, the words amount to a new grant. Beſides, *Potter* has concluded himſelf from entering upon *Archer* by his acceptance of the deed, and if he cannot enter he can maintain no ejectment. Now if *Potter* can maintain no ejectment, neither can the mortgagees, for the mortgage deed alſo notices the leaſe. In *Goodright* v. *Strathan*, *Doug.* 54. note [17] and *Cowp.* 201, S. C. a leaſe void in its commencement, was held to be ſet up as a new leaſe by ſubſequent circumſtances.

The Court were of opinion, that the Plaintiff was entitled to recover, and *Buller J.* obſerved, that although a perſon might take a future intereſt as remainder-man, under a clauſe contained in an

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(*a*) The caſe is to be found in that part of *Bendloe's Reports* which follows ſome caſes reported by Juſtice *Dalliſon*, and alſo in N. *Bendloe*, *pl.* 150, *p.* 38.

indenture to which he was no party, yet that it did not follow that a preſent intereſt could be ſo taken (*a*).

Per Curiam, Judgment for the Plaintiff.

Blyth *v.* Harrison.

June 4th.

A priſoner in cuſtody on meſne proceſs, is ſuperſedable, unleſs a copy of the declaration be *delivered* before the end of the Term after the proceſs is returnable.

The Defendant in this action was arreſted by the Sheriff of *Lincolnſhire* on a writ returnable in *Hilary* Term 1796, and detained in cuſtody; on the 20th of *April* in *Eaſter* Term, a declaration was entered in the Prothonotary's Office, and a rule to plead given, but no copy of the declaration was delivered either to the priſoner or his gaoler till the 10th of *May*, which was the day after *Eaſter* Term expired. The Defendant conceiving that the Plaintiff was bound not only to enter the declaration, but to deliver a copy of it within the Term, and that without ſuch delivery, he could not be ſaid to have declared, took out a ſummons for a *ſuperſedeas* before *Buller* J. who directed him to make his application to the Court. Accordingly a rule *Niſi* having been obtained for his diſcharge:

Le Blanc Serjt. now ſhewed cauſe, and contended that though by the rule of this Court, *E.* 5 *W.* & *M. Reg.* 3. a priſoner be entitled to his *ſuperſedeas* unleſs the declaration be entered in the office before the end of the Term next after that in which the proceſs is returnable, yet that the copy of the declaration is not required by that or any other rule to be delivered to the priſoner within the Term; that the 6th ſection of the rule allows the Plaintiff ten days after *Eaſter*, and twenty days after every other Term, to file his affidavit of the delivery of the copy, either of which periods is more than ſufficient for the purpoſe of filing the affidavit, and was therefore certainly allowed that the Plaintiff

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(*a*) In *Co. Litt.* 231, *a.* is the following paſſage to the ſame effect. "And albeit, "he in the remainder be no party to the indenture (the parties thereunto only being "the leſſor and the tenant for life) yet "when he in the remainder entereth and "agreeth to have the lands by force of "the indenture, he is bound to perform the "conditions contained in the indenture. "And here is alſo a diverſitie to be underſtood, that any eſtranger to the indenture "may take by way of remainder, but he "cannot in this caſe take any preſent eſtate "in poſſeſſion, becauſe he is an eſtranger to "the deed." So in *Gilby* v. *Copley*, 3 *Lev.* 139. the ſame doctrine is laid down by *Levins* Juſtice, who ſays, "eſt un common "erudition que un que n'eſt party à un fait "inter parties ne peut prender per un "fait niſi per voy de remainder;" and he cites *Cooker* v. *Child*, which is to be found 2 *Lev* 74. Lord *Holt* alſo in *Salter* v. *Kidgly*, *Carth.* 77. held, "that one party to a "deed could not covenant with another who "was no party, but a mere ſtranger to "it."

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might have time to deliver the copy of the declaration after the expiration of the Term; that if this application ſhould be granted, a Plaintiff might be obliged to declare ſome time before the ſecond Term is expired (till the laſt hour of which he is entitled to delay his declaration), for wherever the priſoner ſhould be in the cuſtody of a ſheriff of a diſtant county, it would be neceſſary that the declaration ſhould be filed ſome days before, in order that the copy might be ſent into the country and delivered in due time. He truſted therefore, that the Court would not abridge the Plaintiff of any portion of his privilege.

Runnington Serjt. in ſupport of the rule, relied upon the eſtabliſhed practice of the Court, and upon the ſtatute 4 & 5 *W.* & *M. c.* 21. *ſ.* 2. which he contended was compulſory on the Plaintiff as to the delivery of the copy of the declaration within the ſecond Term, that being the time appointed not only for declaring but alſo for delivering the copy, according to the true conſtruction of the ſtatute: that if it were otherwiſe, great inconvenience would enſue, no other time being limited for the delivery of the copy, at leaſt till the ten days allowed for filing the affidavit had elapſed: That the priſoner had no other means of knowing that the declaration had been entered at the office, and could therefore take no ſteps to obtain his *ſuperſedeas*, even where the Plaintiff had neglected to declare within the Term. He urged alſo, that the delivery of the declaration was the moſt eſſential part of declaring, *Strickland* v. *Hodgſon*, *Cooke's Caſ. Prac.* 114, and that the Defendant could not otherwiſe know what to plead.

The Court entertaining ſome doubt on the effect of the rule of *E.* 5 *W.* & *M. ſ.* 6. took time to conſider: And on this day the unanimous opinion of the Court was delivered by

EYRE Ch. J. This will be found to be a queſtion upon the conſtruction of the ſtatute 4 & 5 *W.* & *M. c.* 21. rather than of the rule referred to. That act is entitled an act for delivering declarations to priſoners. It recites, that by the courſe of practice in the reſpective Courts at *Weſtminſter*, after the Plaintiff in any writ had been at great charge to arreſt a Defendant, which Defendant, for want of bail, had been committed to gaol, unleſs the Plaintiff ſhould, before the end of two Terms next after the arreſt, cauſe the Defendant by writ of *Habeas Corpus* to be removed, to be charged in Court with a declaration, ſuch priſoner ſhould upon common bail or appearance, by attorney, be diſcharged. It therefore provides, that if a perſon be taken or charged in cuſtody at the ſuit of another, upon any writ out of the Courts at *Weſtminſter*, and impriſoned or detained in priſon for want of ſureties for his appearance to the ſame, the Plaintiff ſhall and may by virtue of that act, before the end of the next Term after the writ ſhall be returnable, *declare againſt ſuch priſoner* in the court out of which the writ ſhall iſſue, and ſhall or may cauſe a true copy thereof to be delivered to ſuch priſoner or to the gaoler; to which declaration the priſoner ſhall appear and plead, and if he does not, the Plaintiff ſhall have judgment in ſuch manner as if the priſoner had appeared in the ſaid court, and refuſed to anſwer or plead to ſuch declaration. Here is a new mode of declaring againſt a priſoner ſubſtituted in the room of the old courſe, which was to bring him up and charge him with a declaration. The new mode is declaring in court, and delivering a copy of the declaration to the priſoner or gaoler; as to the time, there is in effect no alteration. By the old courſe, they were to bring up the priſoner to charge him within two Terms; in the new mode they are to declare, &c. before the end of the next Term after the writ ſhall be returnable. The ſtatute goes no further than to direct in general terms, that the priſoner ſhall appear and plead to this declaration, and in default the Plaintiff is to have judgment as if the priſoner had appeared and had refuſed to anſwer or plead. The priſoner is to appear and plead *according to the courſe of the court.* The effect of this branch of the ſtatute is ſimply to eſtabliſh, that in this form the Plaintiff is to declare, that this ſhall be the declaration to which the priſoner ſhall appear and plead. The courſe of the court, as to the priſoner appearing and pleading, is governed by practice, and by ſeveral rules, and amongſt others, by a rule of *Eaſter* Term 5 *W. & M. Reg.* 3.; which (after providing that the copy of the declaration ſhall not be delivered to the priſoner before the return of the proceſs) provides that no rule ſhall be given for the defendant in cuſtody to appear and plead to any declaration, until an affidavit be filed with the proper ſecondary of the *delivery of the copy of ſuch declaration*, and of the time when, and the perſon, to whom the ſame copy was delivered. The filing of this affidavit, and delivery of the copy, were firſt introduced here for a purpoſe collateral to the mode of declaring. Then follows the rule, that if the declaration be not entered or left in the office before the end of the next Term after the writ be returnable, and affidavit made and filed in manner aforeſaid, before the end of twenty days after ſuch Term (*Eaſter* Term excepted, and within ten days after *Eaſter* Term) the priſoner ſhall be diſcharged upon the entering of his appearance with the proper officer, by writ of *ſuperſedeas*, according to the ancient practice of this Court. This rule adds a new term to the rule for declaring as laid down by the ſtatute: by the ſtatute they were to declare and leave a copy before the end of the next Term, now they are alſo to file the affidavit of the delivery of the copy within a limited time. If they do not declare and leave a copy within the time limited, the priſoner is ſuperſedable. In the preſent caſe the Plaintiff has declared in time, and has filed his affidavit in time, but he has not left a copy in time. The 8 & 9 *Will.* 3 *c.* 27, *ſ.* 13. which reſpects priſoners in the *Fleet*, was probably made in conſequence of a doubt, whether the former ſtatute extended to them, and provides that it ſhall be lawful for any perſon after filing or entering a declaration with the proper officer, to deliver a copy of ſuch declaration to the defendant, or to the officer of the *Fleet*, and, after rule given thereupon, to be out in eight days at moſt after delivery of the copy, and affidavit made of the delivery, to ſign judgment, as if the defendant had been actually charged at the bar with the action. Here filing and entering the declaration with the proper officer, and delivering the copy, is made ſufficient, and from hence we may collect, that declaring in the ſtatute 4 & 5 *W.* & *M.* and filing or entering the declaration with the proper officer in this ſtatute mean the ſame thing; and to both is ſuperadded delivering a copy, as that which ſhall be tantamount to the ancient mode of charging with a declaration. In the rule of *Eaſter*, 8 *Geo.* 1. which reſpects the declaring againſt priſoners who have ſurrendered in diſcharge of their bail, and provides that the Defendant ſhall be entitled to his *ſuperſedeas*, unleſs the Plaintiff *ſhall declare* againſt the Defendant within two Terms after the render, the language is ſimply, "*ſhall declare*;" but this includes filing or entering the declaration and delivering the copy. This may be collected from the caſe of *Clavey* and *Watts*, 2 *Bl.* 786. where the Court ordered a *ſuperſedeas*, becauſe the declaration was not delivered to the party himſelf or to the turnkey in time. That was a ſtrong caſe, for the declaration had been delivered in time to the Defendant's attorney, the Defendant having put in ſpecial bail by attorney, and afterwards ſurrendered. Reſpecting detainers of priſoners in the *Fleet*, it is ordered by another rule, that *no copy of a declaration delivered* at the *Fleet* priſon againſt any perſon there ſhall be a ſufficient charge to hold ſuch priſoner to bail, or to detain ſuch priſoner for want of bail, unleſs an affidavit to hold to bail is made and filed, and an indorſement made by the prothonotary upon ſuch copy of the declaration, ſignifying the ſum of money ſpecified. Here the *entering* and *filing* the declaration is dropped, and the *delivery of the copy of the declaration* is conſidered as the eſſence of the declaration, though doubtleſs the declaration would ſtill be to be entered in the *Prothonotary's* office. There was a caſe of *Pryme and others* v. *Moore*, in *Barnes* notes of practice, *p.* 392, where the Court ſet aſide the proceedings againſt a Defendant, who had been ſerved with a copy of proceſs, and had become a priſoner before declaration, the Plaintiff having entered an appearance for him according to the ſtatute, and left a declaration in the office, and given him notice of it; the Court being of opinion, that the declaration ought to have been delivered at the *Fleet*; which is further proof, that delivery of the copy of the declaration is conſidered as an eſſential part of declaring againſt a priſoner. It has been thought ſo eſſential, and ſo much more eſſential than the entry of the declaration, that in *Strickland* v. *Hodgſon*, (*Cooke's Rep.* 114. and *Barnes*, 372.) it was held, that a declaration againſt a priſoner in a county gaol need not be entered with the prothonotary before the delivery, but that it muſt, before it is filed with the ſecondary, which, it is ſaid, means any time before rule to plead. But to prevent miſtake, I would obſerve, that this caſe does not ſeem to apply to the queſtion, what ſhall amount to declaring in due time? We are all therefore of opinion, that the Defendant in this caſe is ſuperſedeable, becauſe the Plaintiff did not deliver a copy of the declaration before the end of the term after the proceſs was returnable.

Per Curiam, Rule abſolute.

BOLTON *v.* PULLER and Others, Aſſignees, &c.

June 15th.

TROVER for two bills of exchange; one of 4000*l.* and one of 398*l.* 8*s.* 3*d.*

A. B. C. & *D.* were partners in a banking-houſe at *Liverpool*, and *C.* & *D.* alſo carried on a ſeparate mercantile concern in *London*; *J. S.* having accepted bills payable at the houſe of *C.* & *D.* employed *A. B. C.* & *D.* to get them paid accordingly, and agreed to depoſit with them good bills indorſed by him, for the purpoſe of enabling them ſo to do; *A. B. C* & *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he depoſited; ſome of the bills ſo depoſited by *J. S.* were remitted by *A. B. C.* & *D.* to *C.* & *D.* upon the general account between the two houſes, and before any of the acceptances of *J. S.* became due both houſes failed, and *J. S.* was obliged to pay his own acceptances; held that the aſſignees of *C.* & *D.* were entitled to retain againſt *J. S.* the bills remitted to them by *A. B. C.* & *D.* Held alſo, that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of *C.* & *D.* though ſent by *A. B. C.* & *D.* before that event.

The Defendants pleaded the general iſſue, and at the trial before *Eyre* Ch. J. at the *Guildhall* ſittings after *Michaelmas* Term, 1795, a ſpecial verdict was found to the following effect: *John Bolton* was a merchant at *Liverpool*; *John Forbes* and *Daniel Gregory*, for ſome years, and until they became bankrupt, were co-partners, and carried on buſineſs as merchants in *London*, under the firm of *Burton, Forbes* and *Gregory*. On the 1ſt of *May*, 1774, *Forbes* and *Gregory* entered into partnerſhip with one *Charles Caldwell* and one *Thomas Smith*, in the trade and buſineſs of bankers, to be carried on at *Liverpool*, under the firm of *Charles Caldwell* and Co. and ſo continued to trade till that houſe became bankrupt. The houſe at *Liverpool* had dealings and tranſactions with *Forbes* and *Gregory*, carrying on buſineſs as merchants under the firm of *Burton, Forbes* and *Gregory*, in *London*; and between the two houſes in *Liverpool* and *London*, there was an open account current. *Bolton* for ſome years, and until the houſe at *Liverpool* became bankrupt, employed that houſe as his bankers; and they uſed to procure bills which had been accepted by him, payable at the houſe in *London*, to be there paid when they fell due. Thoſe payments when made were carried by the houſe in *London* to their account with the houſe at *Liverpool*, and by the houſe at *Liverpool* to their account with *Bolton*. In the banking account between *Bolton* and the houſe at *Liverpool*, *Bolton* was made debtor for caſh received of them, and for bills accepted by him payable at the houſe in *London*; and was credited in ſuch account for all bills and caſh paid by him into the ſaid houſe. An intereſt account was kept between *Bolton* and the houſe at *Liverpool*, which was balanced every three months; and the latter was alſo allowed a profit on the ſaid account of one-quarter *per cent.* on bills and caſh paid, either by them or by the houſe in *London*, on their account, for the uſe of *Bolton*. Bills having been accepted by *Bolton* to the amount of 19,702 *l.* payable at the houſe in *London*, on the 28th of *February* 1793, he propoſed to the houſe at *Liverpool*, that they ſhould procure the ſame to be paid as they fell due by the houſe in *London*, and that to enable the houſe at *Liverpool* to provide for ſuch payments, he ſhould deliver to them certain other bills of exchange whereof thoſe mentioned in the declaration were parcel with his indorſement thereon; to this propoſal the houſe at *Liverpool* agreed. In purſuance of this agreement, *Bolton* on the 1ſt of *March* 1793, and on other days between that day and the 16th of *March* in the ſame year, delivered to the houſe at *Liverpool*, ſeveral bills of exchange, amounting in the whole to the ſum of 11,583*l.* 2*s.* 9*d.*; among theſe was the bill for 4000*l.* mentioned in the declaration. On the 16th of *March* 1793, he delivered to the ſame houſe other bills, with a check on that houſe (which they received as caſh,) to the amount of 912*l.* 1*s.* 0*d.*; among theſe was the bill for 398*l.* 18s. 3*d.* alſo mentioned in the declaration. All theſe bills were the property of *Bolton*, and duly indorſed by him; the bill for 4000*l.* having alſo previouſly to the delivery been accepted by him. On the 4th *March* 1793, the bills accepted by *Bolton*, payable at the houſe in *London*, were by the houſe at *Liverpool* entered on the debit ſide of the account between them and *Bolton*; and the bills delivered by *Bolton* to the houſe at *Liverpool*, were by them carried to his credit in the ſame account at the times when they were reſpectively delivered. On the debit ſide of the books of the houſe at *Liverpool*, it appeared that *Bolton's* acceptances, amounting to 19,702*l.* 13*s.* 10*d.*, were entered thus:—"*March* 4th, 55 acceptances due in *April*, 19,702*l.* 13*s.* 10*d.*"; and on the credit ſide, the bills delivered to the houſe by *Bolton* were entered, ſome with the date of their delivery and the day on which they were to fall due, and ſome with the former only. On the 2d of *March* 1793, the houſe at *Liverpool* remitted the above-mentioned bill for 4000*l.* together with other bills to the amount in the whole of 30,000*l.* and upwards, to the houſe in *London*, to be carried to the account of the houſe at *Liverpool*; and on the 16th of *March*, they remitted the above-mentioned bill for 398*l.* 18*s.* 3*d.* together with other bills, amounting in the whole to 8000*l.* and upwards, to be carried to the ſame account. This laſt bill for 398*l.* 18*s.* 3*d.* was received by the houſe in *London* on the 18th of *March* 1793. Some of the bills delivered by *Bolton* to the houſe at *Liverpool* were negotiated by them, and the value received to their own uſe. On the 28th of *February* 1793, and from thence till the bankruptcy of the houſe at *Liverpool*, the houſe in *London* was largely in advance to the houſe at *Liverpool*. On the 16th of *March* 1793, the houſe at *London* became inſolvent, and on the 18th of the ſame month a commiſſion of bankruptcy iſſued againſt them, under which the preſent Defendants were aſſignees. On the ſame day the houſe at *Liverpool* alſo became bankrupt, and a joint commiſſion of the ſame date iſſued againſt *Charles Caldwell*, *Thomas Smith*, *John Forbes*, and *Daniel Gregory*, as partners in the banking-houſe at *Liverpool*. The houſe at *Liverpool* at the time of their bankruptcy was indebted to *Bolton* in the ſum of 2000*l.* and upwards; and

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none of that parcel of bills, amounting to 19,702*l.* 13*s.* 10*d.* accepted by *Bolton*, payable at the houſe in *London*, were paid either by that houſe or by the houſe at *Liverpool*, but were paid by *Bolton* himſelf. The Defendants poſſeſſed themſelves of the two bills in queſtion as aſſignees of *Forbes* and *Gregory*, and refuſed to deliver them on demand.

This caſe was firſt argued in *Eaſter* Term laſt by *Williams* Serjt. for the Plaintiff, and *Heywood* Serjt. for the Defendants, and a ſecond time in this term by *Adair* Serjt. for the former, and *Le Blanc* Serjt. for the latter.

Arguments for the Plaintiff. In the firſt place *Caldwell* and Co. at *Liverpool*, and *Forbes* and *Gregory* in *London*, are, with reſpect to the tranſactions on which this caſe ariſes, to be conſidered as the ſame perſons. Secondly, the bills for which this action was brought, were appropriated by *Bolton* to the particular purpoſe of anſwering his acceptances at the houſe in *London*, and not paid in on the general account. Thirdly, trover is the proper form of action. Firſt, though a ſeparate trade was carried on by *Forbes* and *Gregory* in *London*, yet as they were alſo partners in the banking-houſe at *Liverpool* they were parties to the acts of *Caldwell* and *Smith*, and therefore the agreement made by them with *Bolton* was the joint engagement of the four partners, and binding on them all in law. The demands of third perſons on the houſe at *Liverpool*, cannot be affected either by the diſtant reſidence of *Forbes* and *Gregory*, or by their ſeparate concerns. Secondly, it is ſettled law that the property of goods depoſited with a factor and not diſpoſed of, continues in the principal, and may (ſubject to the factor's lien) be recovered in trover either againſt him or his aſſignees. In the preſent caſe the Defendants have no lien; for the balance of account is in the Plaintiff's favour. *Bolton* therefore is entitled to recover, unleſs precluded by the preferable right of the creditors of the houſe in *London* to the ſeparate eſtate of *Forbes* and *Gregory*. Admitting that the bills were remitted by the houſe at *Liverpool* to the houſe in *London* on the general account, and thereby became the ſeparate property of the latter, ſtill, whatever rule courts of equity may have adopted in the apportionment of the joint and ſeparate eſtate to the reſpective creditors, it has never been held in a court of law, that an action will not lie becauſe the thing demanded has in this manner become the ſeveral property of a ſingle partner; for private agreements made between partners, as to their claims upon each other, cannot affect the creditors of the firm. *Waugh*

v. *Carver*, 2 *H. Bl.* 235. But this is not a queſtion between creditors of the two houſes, but an action by *Bolton* for the recovery of ſpecific goods. Though, therefore, the remittance of the bills might have tranſmuted the property to the houſe in *London* as againſt the houſe at *Liverpool*, it cannot have that effect as againſt *Bolton*. The houſe at *Liverpool* had it not in their power to negotiate theſe bills generally without a breach of their agreement. For it is to be obſerved, that the houſe at *Liverpool* were not parties to the bills which *Bolton* had accepted, payable at the houſe in *London*; ſo that theſe bills were not depoſited with the houſe at *Liverpool*, to indemnify them againſt thoſe acceptances (to which they were not liable) but to be applied ſpecifically in their diſcharge. Herein conſiſts the difference between this and the caſe of a banker who draws on his correſpondent in favour of a cuſtomer, and takes bills as an indemnity. And by this it is alſo diſtinguiſhed from the caſe of *Bent and another* v. *Puller and others*, 5 *Term Rep.* 494. In that caſe *Caldwell and Co.* had made themſelves liable on their drafts in favour of *Bent*, and had therefore a lien on the bills depoſited by him: but in the preſent inſtance they had no ſuch lien on the bills depoſited by *Bolton*, who might if he pleaſed have recalled them at any time before they were applied to the diſcharge of his acceptances. This diſtinction is alſo ſupported by the caſe *Ex parte Dumas*, 2 *Vez.* 582. 1 *Atk.* 232. S. C. At all events the Plaintiff is entitled to recover the leſſer bill for 398*l.* 18*s.* 3*d.*, that not having arrived in *London* till the 18th of *March*, which was two days after the failure of *Forbes* and *Gregory*. Thirdly, if the property of theſe bills be in the Plaintiff, trover is the proper remedy. Lord *Hardwicke*, indeed, in the caſe *Ex parte Dumas*, ſeems to expreſs a doubt upon this point, becauſe the legal property follows the *choſe in action* which is aſſigned by the indorſement. In the preſent caſe, however, the indorſement was not intended to transfer the property at all events, but only to enable the houſe at *Liverpool* to apply the bills to the purpoſe for which they were depoſited. Now, that application was not made, and therefore the property of the bills remains as if they had never been indorſed. In *Bent* v. *Puller*, if the bills had been appropriated, trover might have been maintained for them; and in *Tooke* v. *Hollingworth*, 5 *Term Rep.* 215. (*a*), though the Court differed in opinion on the caſe, no objection was taken to this form of action, and judgment was given for the Plaintiff.

Arguments for the Defendants. Firſt, the bills in queſtion were paid in upon the general account between *Bolton* and the houſe at *Liverpool.*

(*a*) And 2 *H. Bl.* 508.

Liverpool. It appears from the ſpecial verdict, that during the intercourſe between *Bolton* and that houſe, previous to this tranſaction, the bills lodged by the latter with the former were always paid to the general account. Had they ever been appropriated in this caſe, they would not have anſwered the object of that appropriation; for the bills accepted amounted to 19,702 *l.* 13 *s.* 10 *d.* whereas thoſe depoſited amounted to 12,495 *l.* 3 *s.* 9 *d.* only. Beſides, it appears from the dates of the latter, that they were not to become due till after the acceptances, and therefore were not calculated either in amount or time to be employed ſpecifically in their diſcharge. This tranſaction was merely a continuation of the general dealings between *Bolton* and the houſe at *Liverpool.* No particular account was either agreed upon or kept; had there been any ſuch it muſt, as in the caſe *Ex parte Dumas*, have been diſtinguiſhed by ſome characteriſtic title or appropriate mark. If the bills had been meant as a depoſit, they would not have been indorſed by *Bolton.* They were in fact paid in with a view to ſwell his credit with the houſe at *Liverpool*, to a level with the large diſburſements about to be made on his account. The bill for 398 *l.* 18 *s.* 3 *d.* is not diſtinguiſhed from that for 4000 *l.*; for though it was not received in *London* till after the ſeparate bankruptcy of *Forbes* and *Gregory*, it was put into the poſt-office, and the poſtage paid, during the ſolvency of the houſe at *Liverpool;* the property, therefore, here was as effectually changed as the property of goods delivered to a carrier, which has been held to veſt in the aſſignees of the vendee unleſs ſtopped *in tranſitû. Haſwell* v. *Hunt*, *cit. per Buller* J. *Tooke* v. *Hollingworth*, 5 *T. R.* 231. and *Ellis* v. *Hunt*, 3 *Term Rep.* 464. Secondly, the houſe in *London* was diſtinct from that at *Liverpool*, and the acts of the former were not binding on the latter. Indeed, the Plaintiff himſelf engaged the houſe at *Liverpool* to do a ſeparate act by the terms of his agreement; the houſe in *London* being only known to him as the correſpondent of that at *Liverpool*: at leaſt it does not lie with him who has treated them as diſtinct, to make them reſponſible as one. Though the funds of the houſe in *London* as belonging to two of the partners in the houſe at *Liverpool* be liable to the Plaintiff's demand upon the latter houſe, yet againſt the aſſignees of *Forbes* and *Gregory* as the ſeparate firm, this action cannot be maintained. Suppoſe the houſe in *London* to have conſiſted of four partners, two of whom were ſtrangers to the houſe at *Liverpool;* the four would not have been liable becauſe *Forbes* and *Gregory* were members of the latter partnerſhip; and even if the ſtrangers were removed, the houſes would remain equally diſtinct. *Forbes* and *Gregory* in their ſeparate capacity were no parties to the agreement between *Bolton* and the houſe at *Liverpool*. If the latter had got the bills diſcounted with a third perſon, and ſent the caſh ariſing therefrom to *London* to anſwer the acceptances, ſuch perſon might have returned the bills whether the acceptances were paid or not. The houſe at *London* ſtands in the place of ſuch perſon, and therefore this action cannot be maintained againſt their aſſignees. The caſe of *Waugh* v. *Carver* only decides, that the private agreements of partners individually between each other, cannot affect the rights of creditors to ſue them all upon the joint account. Thirdly, trover is not the proper remedy. It is immaterial whether the bills were indorſed in blank, or to the houſe at *Liverpool*. The object of the indorſement was to paſs the property on the faith of the ſubſiſting agreement. Had the bills been entered *ſhort* in the account, they would then, according to the opinion of *Blackſtone* J. in *Zinck* v. *Walker*, 2 *Bl.* 1156. have been only a depoſit, and have remained the property of *Bolton*. In this caſe they were meant to be converted into caſh, and therefore cannot be recalled. It has been decided, that if a man deliver money to another to buy cattle, the property of the money is in the bailee, 3 *Leon.* 38. *Anon.* So if goods be delivered to *A.* to pay a debt to *B.*, *A.* may ſell them. *Bridget Clarke's Caſe*, 2 *Leon.* 30. If then the legal property paſſed by the indorſement, Lord *Hardwicke's* opinion in the caſe *Ex parte Dumas* is deciſive, even though the Plaintiff be deemed to have an equitable lien; for though it cannot be recovered by the legal owner againſt one having an equitable lien, yet it has never been held that trover will lie againſt the legal owner by him who hath an equitable lien. Neither in *Tooke* v. *Hollingworth*, or in *Bent* v. *Puller*, are the bills ſtated to have been indorſed, nor was there any queſtion on the nature of the remedy.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Eyre Ch. J. (who, after ſtating the caſe, ſaid): The queſtion is, Whether the Plaintiff can maintain this action upon this caſe? For him it is urged, that the houſe in *London* is a houſe of trade, carried on by two of the partners in the banking-houſe at *Liverpool;* though it is admitted, that the trade carried on in *London* is the ſeparate eſtate of thoſe two partners. It is inſiſted, that the bills in their hands remained in the ſame ſtate, ſubject to the ſame rules of law and equity, as would have applied to them in the poſſeſſion of the houſe at *Liverpool;* and that, having been appropriated (as it is called), or delivered to the houſe at *Liverpool* for a ſpecial purpoſe, and not having been ultimately applied to that purpoſe, and remaining in ſpecie in their poſſeſſion, *Bolton* would have been entitled to demand to have them delivered up to him by the banking-houſe at *Liverpool,* or by the aſſignees of that houſe, ſuppoſing them to have come to the hands of thoſe aſſignees. I take it to be now ſettled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up, ſubject only to the lien, which the banker may have upon them for the balance of his account. On the other hand it is clear, that, if indorſed bills are depoſited with a banker, and they are by him negotiated to a third perſon, though the purpoſe, for which they were depoſited ſhould be ever ſo cruelly diſappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover againſt ſuch third perſon (*a*). The preſent ſeems to be a middle caſe, and, I believe, is a new one. We muſt endeavour to aſcertain to which claſs it belongs.

There can be no doubt, that, as between themſelves, a partnerſhip may have tranſactions with an individual partner, or with two or more of the partners having their ſeparate eſtate, engaged in ſome joint concern, in which the general partnerſhip is not intereſted; and that they may by their acts convert the joint property of the general partnerſhip into the ſeparate property of an individual partner, or into the joint property of two or more partners or *e converſo.* And their tranſactions in this reſpect will, generally ſpeaking, bind third perſons, and third perſons may take advantage of them in the ſame manner, as if the partnerſhip were tranſacting buſineſs with ſtrangers; for inſtance—ſuppoſe the general partnerſhip to have ſold a bale of goods to the particular partnerſhip, a creditor of the particular partnerſhip might take thoſe goods in execution for the ſeparate debt of that particular partnerſhip. In ſome reſpects therefore an individual partner, or a particular partnerſhip conſiſting of two or more of thoſe perſons, who are partners in ſome larger partnerſhip, may be conſidered as third

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(*a*) *Vid. Collins* v. *Martin, poſt. Hil. Term* 1797.

perſons in tranſactions, in which the general partnerſhip may happen to be engaged with their correſpondent. On the other hand it will be difficult, if not impoſſible, for individual partners, or for particular partnerſhips compoſed of individual partners, to ſhake off privity in all the tranſactions of the general partnerſhip, or to avoid all the conſequences of privity. Each partner is a party, as well as privy, to the tranſactions of the general partnerſhip, though the general partnerſhip is not a party to the ſeparate tranſactions of the individual partners. *Forbes* and *Gregory* were therefore parties to the agreement, which *Caldwell* and *Smith* entered into with *Bolton*, and were as much bound by it as *Caldwell* and *Smith* were. And I hold, that if *Bolton* had ſued the houſe at *Liverpool* for a breach of that agreement and had recovered, he might have taken any part of the ſeparate eſtate of the houſe in *London* in execution, in ſatisfaction of his judgment. But this will not touch the queſtion, what ſhall be deemed the joint property, and what the ſeparate property of perſons ſo circumſtanced. Joint or ſeveral, *Bolton*'s claim upon it in the caſe ſuppoſed would be equally available to him.

Bankruptcy, when it intervenes, may very much change the ſituation of theſe parties. Mr. Juſtice *Heath* ſuggeſted this conſideration at the cloſe of the firſt argument. It is a very important conſideration.

If all become bankrupts, all the joint and all the ſeparate property will veſt in the aſſignees, whether the commiſſions are joint or ſeveral. If a ſeparate commiſſion iſſue againſt one partner, his aſſignees will take all his ſeparate property, and all his intereſt in the joint property. If a joint commiſſion iſſues againſt all, the aſſignees will take all the joint property, and all the ſeparate property of each individual partner. In the diſtribution to creditors, a rule of convenience has been adopted. To underſtand it, we ſhould ſee, what the rights of creditors were as to execution for their debts before bankruptcy. A ſeparate creditor might take at his election the ſeparate eſtate of his debtor, or his debtor's ſhare of the joint eſtate, or both, if neceſſary. A joint creditor might take the whole joint eſtate, or the whole ſeparate eſtate of any one partner. But the rule of convenience, which has been adopted, reſtrains the ſeparate creditor from reſorting in the firſt inſtance to his debtor's ſhare of the joint property; and alſo reſtrains the joint creditor from reſorting in the firſt inſtance to the ſeparate property of his debtor. Bankruptcy has been called a ſtatute execution; but, if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the Chancellor, who is to take order for the diſtribution of the effects of a bankrupt. Under the rule the ſeparate creditors have a right to be ſatisfied for their debts out of the ſeparate property, in preference to the joint creditors (*a*). But what ſhall be deemed ſeparate property, or what effect the claims of third perſons upon that which (as between one partner and the partnerſhip) would be ſeparate property, are queſtions, which neither bankruptcy nor the rule of diſtribution ſeem to touch. The aſſignees ſtand but in the place of the bankrupts, and take the effects ſubject to every legal and equitable claim upon thoſe effects. And therefore I conclude, that though bankruptcy very much alters the ſituation in which I have placed Mr. *Bolton*, in the courſe of the argument, as a creditor having obtained a judgment againſt the banking-houſe at *Liverpool* on the ground of this agreement; the queſtion now made between him and the aſſignees of *Forbes* and *Gregory* remains undecided, and muſt (as it appears to me) depend on an inquiry into the effect of the privity and participation of *Forbes* and *Gregory* in the tranſaction between *Bolton* and the banking-houſe at *Liverpool*, in which they were partners.

The true nature of that tranſaction has been warmly diſputed in the courſe of the argument; but it comes out to be ſimply this: *Bolton* paid into his banker's hands theſe bills on his general account for a particular purpoſe. This has been called an appropriation; and legal conſequences are deduced from thence, as if appropriation was a technical term, or at leaſt was uſed in ſome definite or preciſe ſenſe; whereas no term in popular uſe can be more general, or more uncertain in its import. In truth, when I ſay, theſe bills were paid in on a general account for a particular purpoſe, I mean only to ſay, that the object which the parties had in their view was, that the bankers might be enabled to provide

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(*a*) This rule was adopted by Lord Chancellor *Hardwicke*, and acted upon till overturned by Lord Chancellor *Thurlow*. The ſubject has ſince been fully conſidered by Lord Chancellor *Loughborough*, in the caſe *Ex parte Elton*, 3 *Vez.* jun. 238. but does not appear to have been altogether ſettled, though the inclination of his Lordſhip's opinion was ſtrongly in favour of the old rule adopted by Lord *Hardwicke*. For the caſes on this point ſee *Cooke's B. L.* from page 237 to 250. *ed.* 4.

for the payment of Mr. *Bolton*'s acceptances in *London*. So far from being appropriated to any particular purpoſe in the ſtrict ſenſe of the word, the bills in ſpecie were not intended to be applied to any other purpoſe than to be converted into caſh, in order to increaſe Mr. *Bolton*'s credit with his bankers; and in the nature of things they could not be applied in ſpecie to the particular purpoſe of paying Mr. *Bolton*'s acceptances in *London*. Theſe bills, at leaſt the bills in queſtion, were remitted to the houſe in *London* on the general account of the banking-houſes. We cannot think that this was a miſapplication; or that the confidence of Mr. *Bolton* was abuſed. It may be aſked, aſſuming that Mr. *Bolton* conſidered both houſes to be in full credit, was it not the very thing he meant? was not this the probable mode by which the banking-houſe would be enabled to provide for the payment of Mr. *Bolton*'s acceptances at the houſe of *Forbes* and *Gregory*? Then what effect can the privity and participation of *Forbes* and *Gregory* in the agreement between *Bolton* and the banking-houſe have on this tranſaction? which, *as between the two houſes, undoubtedly changed the property in theſe bills*; a circumſtance which diſtinguiſhes this caſe from all the caſes which have been determined on this ſubject, and puts it out of the reach of the principle upon which the caſe of *Zinck* v. *Walker*, and the late caſe of *Tooke* v. *Hollingworth*, in the Court of Error were determined. The privity of *Forbes* and *Gregory* to the tranſaction at *Liverpool* rather created a demand upon them to do what they did, than to take any other courſe; for there is no pretence to ſay that it was intended that a ſeparate account of theſe bills ſhould be kept by any body. The buſineſs went on in the regular channel upon the foot of the agreement, without the leaſt imputation upon it, up to the moment of the bankruptcy, when the adverſe rights of the creditors of the two houſes attached.

If up to the moment of the bankruptcy nothing affected the right of *Forbes* and *Gregory* to hold theſe bills on their ſeparate account, that right muſt veſt in the aſſignees of *Forbes* and *Gregory* with nothing to affect it. The aſſignees of *Forbes* and *Gregory* are bound to admit that *Forbes* and *Gregory* knew that Mr. *Bolton*'s object, and that the object of the partnerſhip at *Liverpool* was, that by means of theſe bills the acceptances were to be provided for. But how were theſe bills to operate as means? They were to be dealt with as the banking houſe thought fit to deal with them;

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Bolton *v.* Puller, and Others.

to be negotiated, if they thought fit; to be diſcounted at *Liverpool*, if they pleaſed, or remitted to whom they pleaſed; and were neceſſarily to be converted into money, in order to be means effectual to the purpoſe even of the parties who depoſited them.

If then *Forbes* and *Gregory* were parties capable of acquiring a property in theſe bills, as capable as any third party, and did acquire it without reproach, and in truth in purſuance of that agreement upon which they were delivered to the banking-houſe; why are not *Forbes* and *Gregory* to be conſidered as third perſons, with whom theſe bills have been negotiated? If they were to be ſo conſidered, this determines the claſs to which I ſaid in a former part of the argument, we were to endeavour to reduce this middle caſe between the caſe of original parties to the tranſaction and the caſe of third perſons holding ſuch bills as theſe in the ordinary courſe of the negotiation of bills of exchange.

A circumſtance belonging to the leſſer bill of 398*l.* 18*s.* 3*d.* was taken notice of in the argument; namely, that it came to the hands of *Forbes* and *Gregory* on the day when they became bankrupt. We are of opinion, that the bill having been remitted, as far as concerned the houſe remitting, before the bankruptcy, and to a creditor, cannot be recalled, and muſt follow the fortune of the other bill.

It is a great misfortune to Mr. *Bolton* to have been ſo deeply concerned with theſe falling houſes. In ſuch caſes it too often happens that heavy loſſes fall ſomewhere. The only conſolation is, that it is the law of the land, and not the caprice, or even error of any man, which can ultimately decide where they ſhall fall.

Our opinion upon this caſe is, that the judgment muſt be for the Defendants.

Judgment for the Defendants.

In this Term, Mr. Serjt. *Gockell* and Mr. Serjt. *Shepherd* were made King's Serjeants.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER;

IN

Michaelmas Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

LIGHTFOOT and Another *v.* TENANT.

Nov. 14th.

To debt on bond, the Defendant pleaded that the bond was given to ſecure payment of the price of goods agreed to be ſold and delivered in *London* by the Plaintiff to the Defendant, to be by the latter ſhipped to *Oſtend*, and from thence re-ſhipped for the *Eaſt-Indies*, and there trafficked with clandeſtinely. Held a ſufficient bar to the action; the caſe being within the 7 *Geo.* 1. c. 21. which avoids all contracts for ſupplying cargoes to foreign ſhips in ſuch a trade.

DEBT on bond. The Defendant prayed *Oyer* of the bond and condition; and then pleaded *non eſt factum*, and five other pleas, ſtating the bond to have been given on an illegal conſideration, on all of which iſſues were joined.

At the trial before *Eyre* Ch. J. at the *Guildhall* ſittings after *Eaſter Term* 1796, a verdict was found for the Plaintiff on the plea of *non eſt factum*, and on the 2d, 3d, and 5th pleas; and a verdict for the Defendant on the 4th and 6th pleas, which were as follow. Fourth plea, that "the Plaintiffs and the Defendant long before the making of the ſaid writing obligatory were and ſtill are ſubjects of this realm; and that before the making of the ſaid writing obligatory *to wit*, on, &c. at, &c. it was unlawfully agreed by and between the Plaintiffs and the Defendant, that the Plaintiffs ſhould ſell and deliver to the Defendant certain goods, wares, and merchandizes of a large value, *to wit*, 363*l.* 10*s.* to be by the Defendant ſhipped on board certain ſhips or veſſels in the port of *London*, and to be carried and conveyed on board of ſuch ſhips and veſſels to parts beyond the ſeas, that is to ſay, to the port of *Oſtend*, to be there ſhipped on board certain other ſhips or veſſels deſtined to ſail to and trade in certain parts in the *Eaſt Indies* beyond the *Cape of Good Hope*, without the licence and authority of the United Company of Merchants of *England* trading to the *Eaſt Indies*, and to be carried and conveyed in and on board the ſaid laſt-mentioned ſhips or veſſels from the ſaid port of *Oſtend* to a certain place in the *Eaſt Indies* beyond the *Cape of Good Hope*, that is to ſay, to *Calcutta*, to be there ſold, trafficked with, and diſpoſed of in a courſe of trade, clandeſtinely and without any licence and authority from the ſaid Company; and that in purſuance of ſuch unlawful agreement the Plaintiffs well knowing that the ſaid goods, wares, and merchandizes were to be carried to *Calcutta* aforeſaid to be there ſold, trafficked with, and diſpoſed of in the courſe of trade, did afterwards, *to wit*, on, &c. at, &c. ſell and deliver to the Defendant the ſaid laſt-mentioned goods, wares, and merchandizes, in order that the ſame ſo to be ſhipped on board the ſaid ſhips or veſſels in the port of *London* aforeſaid might be carried on board ſuch ſhips or veſſels to the port of *Oſtend* aforeſaid, and there ſhipped on board the ſaid other ſhips or veſſels, and that the ſame might be carried and conveyed on board ſuch laſt-mentioned ſhips or veſſels to *Calcutta* aforeſaid, and to be there ſold, trafficked with, and diſpoſed of in a courſe of trade clandeſtinely and without any licence or authority from the ſaid Company. And that the ſaid goods, &c. were accordingly carried and conveyed on board, &c. from the port of *London* to the port of *Oſtend*, and there ſhipped on board, &c. to be carried and conveyed, &c. to *Calcutta* to be there ſold, &c. And that for the ſecuring the payment of the price of the ſaid goods, &c. the Defendant on, &c. at, &c. did make and ſeal, and as his act and deed deliver to the Plaintiffs the ſaid writing obligatory in the ſaid declaration mentioned with the condition thereunder written; and which ſaid writing obligatory for the cauſe aforeſaid is wholly void in law." Sixth plea: that "the ſaid writing obligatory was made, ſealed, and delivered by the Defendant to the Plaintiffs for ſecuring the payment of the price of certain goods, wares, and merchandizes before then ſold and delivered by the Plaintiffs to the Defendant to be by him the

Defendant ſhipped on board certain ſhips and veſſels to be carried and conveyed therein from the port of *London* aforeſaid to parts in the *Eaſt Indies* beyond the *Cape of Good Hope*, that is to ſay to *Calcutta*, the Plaintiffs well knowing that the ſaid laſt-mentioned goods, &c. at the time of the ſale and delivery thereof as aforeſaid were to be ſo carried and conveyed to *Calcutta* aforeſaid to be there ſold, trafficked with, and diſpoſed of in the courſe of trade clandeſtinely and without any licence or authority from the United Company of Merchants of *England* trading to the *Eaſt Indies*; whereby the ſaid writing obligatory was and is wholly void in law."

The bond was dated on the 1ſt of *February* 1794, and the condition was, that the Defendant ſhould pay to the Plaintiffs 363*l.* 10*s.* on or before the 1ſt of *Auguſt* 1795, with intereſt at the rate of 5*l. per Cent.* from the expiration of ſix months after the date of the bond. On the bond was the following indorſement: "*London*, 20th *March* 1794. A policy of inſurance per the ſhip *Kaunitz*, from *Oſtend* to *Bengal* on account of Mr. *James Tenant* reſts in my poſſeſſion, in which the within mentioned account of 363*l.* 10*s.* is included. *T. Bundock.*" This laſt perſon appeared at the trial to have been the Defendant's agent for the purchaſe of the goods, the Defendant himſelf reſiding at *Oſtend.* He proved that it was originally ſtipulated by the Plaintiffs that there ſhould be the above indorſement made on the bond when the policy was effected, which was not to be done till after the arrival of the goods at *Oſtend.*

A rule *Niſi* having been obtained for entering a judgment for the Plaintiff, notwithſtanding the verdict found for the Defendant on the 4th and 6th pleas,

Le Blanc and *Marſhall* Serjts. ſhewed cauſe. 1ſt, The agreement ſtated in the Defendant's pleas is illegal, being within 7 *Geo.*, *Stat.* 1. *c.* 21., by the 2d ſection of which act all contracts and agreements whatſoever made by any of his Majeſty's ſubjects for the loan of any money by way of bottomry, "on any ſhip or ſhips in the ſervice of foreigners, and bound or deſigned to trade to the *Eaſt Indies*, and all contracts and agreements whatſoever made by any of his Majeſty's ſubjects, or any perſon or perſons in truſt for them, for the loading or ſupplying any ſuch ſhip or ſhips with a cargo or lading of any ſort of goods, merchandize, &c." are declared to be void. The agreement there deſcribed is preciſely

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that ſtated in the plea. 2dly, Suppoſing this agreement not to be made void by the 7 *Geo.* 1., ſtill the trade itſelf being illegal, the Plaintiffs cannot recover. The caſe of *Holman* v. *Johnſon*, *Cowp.* 341. will probably be cited on the other ſide. There the goods were ſold in the ordinary courſe of trade, and though the Plaintiffs knew they were to be ſmuggled into this country, they did not ſell them for that purpoſe; the illegal uſe made no part of the contract. But the caſe of *Biggs* v. *Lawrence*, 3 *Term Rep.* 454. is an expreſs authority againſt the Plaintiffs' recovery. The ground of that determination was, that the goods were ſold for the purpoſe of being ſmuggled into *England*. The diſtinction between theſe two caſes eſtabliſhes the Defendant's plea, for the goods here were ſold for the purpoſe of being ſmuggled into *India*, and the agreement was that they ſhould be ſent to *Oſtend*, and from thence to *Calcutta*. *Clugas* v. *Penaluna*, 4 *T. R.* 466. and *Waymell* v. *Reed and another*, 5 *T. R.* 599. are alſo authorities to ſhew that a Plaintiff who takes any part in an illegal tranſaction cannot recover.

Adair and *Shepherd*, Serjts. *contra.* 1ſt, The contract on the part of the Plaintiffs being only to deliver theſe goods at *Oſtend*, this bond is not made void by 7 *Geo.* 1., which does not apply. Here the vendors had full power over the goods, and might have re-ſold them at *Oſtend*, ſince the Plaintiffs' intereſt in them ceaſe on their arrival at that place. 2dly, The caſes decided on this ſubject do not preclude us from recovering. The principle of *Holman* v. *Johnſon* is, that where the contract of ſale is complete before the illegal part of the tranſaction commences, the bare knowledge in the vendor of the vendee's intent does not vitiate the contract. In each of the three other caſes cited, the Plaintiffs had taken ſome ſtep to effectuate the illegal intention. It has never yet been determined that *bare knowledge* of an illegal intent in the vendee, bars the vendor's recovery.

Cur. adv. vult.

The judgment of the Court was this day delivered by

Eyre Ch. J. We are all of opinion, that the 4th plea is good and a ſufficient bar to the Plaintiffs taking any thing by this application. The ground of the defence to be collected from this plea is thus opened by Lord *Mansfield* in *Holman* v. *Johnſon*, *Cowp.* 343. "The objection that a contract is immoral or illegal ſounds "at all times very ill in the mouth of a defendant. It is not for

"his

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“his ſake however that the objection is ever allowed; but it is founded in general principles of policy, which the Defendant has the advantage of contrary to the real juſtice as between him and the Plaintiff, by accident, if I may ſo ſay. The principle of public policy is this *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cauſe of action upon an *immoral or an illegal* act. If from the Plaintiff's own ſtating, or otherwiſe, the cauſe of action appears to ariſe *ex turpi cauſâ*, or the *tranſgreſſion of a poſitive law of this country*, there the Court ſays, he has no right to be aſſiſted.” After this introduction his Lordſhip ſtated the queſtion in that cauſe to be “whether the Plaintiff's demand is founded upon the ground of any immoral act or contract; *or upon the ground of his being guilty of any thing which is prohibited by a poſitive law of this country?*” And this is the queſtion which ariſes between the parties to this record upon the 4th plea. The ſubſtance of this plea is, that it was agreed between the Plaintiffs and the Defendant that the former ſhould ſell and deliver goods to the latter, to be by him ſhipped in the port of *London*, to be carried to *Oſtend*, to be there ſhipped on board ſhips deſtined to trade in the *Eaſt Indies* without licence from our Eaſt India Company, to be carried to *Calcutta*, to be there ſold clandeſtinely; that in purſuance of this agreement, the Plaintiffs ſold and delivered goods to the Defendant, knowing *&c.* and in order *&c.* and that in fact the goods were carried to *Oſtend*, and ſhipped for *Calcutta* to be there ſold; and that this bond was given for ſecuring the payment of the price of thoſe goods, and ſo void in law. It was agreed in the argument, that it is prohibited by the poſitive law of this country to furniſh goods to be ſhipped on board foreign ſhips trading to the *Eaſt Indies*. By the 7 *Geo.* 1. *c.* 21. *ſ.* 2. all contracts and agreements for the loading and ſupplying ſuch ſhips with a cargo are declared to be void. For the Plaintiffs it was contended, that the above admiſſion muſt be taken with this reſerve, that the prohibition attaches only on the perſon who has the immediate intereſt in the ſupply. I admit that the perſon who has the benefit of the ſupply is the immediate object of the act, the title of which is “for the further preventing his Majeſty's ſubjects from trading to the *Eaſt Indies* under foreign commiſſions.” Very probably thoſe who are more remotely concerned in furniſhing the ſupply, may not be directly within the ſcope of the act. But it will not follow, that their contracts will be valid. Upon the principles of the common law, the conſideration of every valid contract muſt be meritorious. The ſale and delivery of goods, nay the agreement to ſell and deliver goods is *primâ facie* a meritorious conſideration to ſupport a contract for the price. But the man who ſold arſenic to one who he knew intended to poiſon his wife with it, would not be allowed to maintain an action upon his contract. The conſideration of the contract in itſelf good, is there tainted with turpitude, which deſtroys the whole merit of it. I put this ſtrong caſe becauſe the principle of it will be felt and acknowledged without further diſcuſſion. Other caſes where the means of tranſgreſſing a law are furniſhed with knowledge that they are intended to be uſed for that purpoſe will differ in ſhade more or leſs from this ſtrong caſe; but the body of the colour is the ſame in all. No man ought to furniſh another with the means of tranſgreſſing the law, knowing that he intends to make that uſe of them. And it will ſeldom happen that this will be the whole for which he will have to anſwer. The man who knows that an illegal uſe is intended to be made of that which he is ſelling, will be thereby impelled to uſe his knowledge to make the contract more beneficial to himſelf, and it may become his intereſt to ſtipulate for himſelf that the illegal uſe ſhall be made of the goods he ſells; and ſo the illegal uſe may be the very *giſt* of the contract. It is a poſſible caſe, that a tradeſman may wiſh to ſpeculate in this contraband trade, and to do it by dividing the profits with ſome man of ſpirit and enterprize but without capital. Such a man would ſtipulate that the goods which he ſold ſhould be put on board a ſhip under a foreign commiſſion, and ſhould be ſent to *Calcutta* to be there ſold. His ſhare of the profits would be found in the price originally fixed on the goods, but his hopes of payment would reſt entirely on the returns of this contraband trade. Such a man would not advance five pounds worth of goods which were not to be employed in the contraband trade. It is eſſential to his views and it enters into the ſpirit of his contract that the goods ſhall be employed according to their deſtination. Doubtleſs the buyer of goods, having them in his poſſeſſion, may divert them from the intended channel; but then he is not the honeſt man whom the ſeller of the goods took him for, and in truth he breaks his contract. This is a ſuppoſed caſe. But this ſuppoſed caſe is not immaterial to the argument; becauſe the ſtrength of the Plaintiffs' caſe, as it has been argued for them, is, that ſuppoſing the tranſaction to have been as it is ſtated to have been in this 4th plea, their ſhare in it *neceſſarily* ended with the delivery of the goods, and by *no poſſibility* could they have any thing to do with their future deſtination. By poſſibility moſt certainly the Plaintiffs might be very deeply intereſted in the future deſtination, though the conduct of the ſpeculation was unavoidably entruſted to the buyer. And a poſſible caſe of intereſt in the future deſtination is an anſwer to the argument that of neceſſity they could have nothing to do with it. But the plea having been found by the jury the Counſel for the Plaintiffs were driven to that argument. The proper time to inſiſt that the Plaintiffs had nothing to do with the future deſtination of the cargo was when the plea was before the jury; and if the truth of the caſe would have warranted it, the fact might have been negatived by evidence, demonſtrating that the Plaintiffs' part in the tranſaction did really end with the delivery, and that the future deſtination had nothing to do with their contract. They might have diſproved all knowledge; indeed it was neceſſary that they ſhould diſprove it. Knowledge affords a ſtrong ground to infer participation in the whole tranſaction. Communications of ſuch a nature are not made unneceſſarily. From the price fixed, the ſituation of the buyer, his ability to pay, a fair account of the extraordinary credit given to him, and other particulars, inferences of fact might have been made by the jury favourable to the ground now taken for the Plaintiffs, that in fact they were not involved in any part of the tranſaction ſubſequent to the delivery; and upon this ground the jury might have been warranted in finding againſt the plea. But the jury having found for the plea, the court cannot ſay that the Plaintiffs had nothing to do with the future deſtination of the goods, unleſs it was impoſſible to ſtate a caſe in which he could have any thing to do with it. I think it was not diſputed that if the Plaintiffs' contract extended to the future deſtination of the goods ſuch a contract would be void. It ſeems therefore hardly neceſſary to enter into an examination of the four caſes which were cited from *Cowper* and the *Term Reports*. The reſult of the caſes is, that knowledge, in the ſeller of the goods delivered, of the future deſtination of thoſe goods, with the further circumſtance of packing the goods in a form convenient for ſmuggling, will avoid the contract if ſued upon here, and *à fortiori* if the ſeller be reſident in this country. The caſe now in judgment is certainly not *in terminis* this caſe. And I uſe the caſes only as authorities for the principle. Upon this plea, the Plaintiffs do not merely *aſſiſt another*, they muſt be taken to be principals in the illicit tranſaction. In that view of the caſe they are directly within the act of parliament. But if the plea had been that the Plaintiffs had ſold theſe goods to the Defendant for the purpoſe of enabling *him* to trade with them clandeſtinely to the *Eaſt Indies*, that would have been a caſe of aſſiſtance within the ſcope of the authorities cited.

Per Curiam, Rule diſcharged.

(In the *Exchequer Chamber.*)

Nov. 16th.

Denn ex dem. Mellor *v.* Moor; in Error.

A. after giving a life eſtate in certain copyholds to *B.* deviſed as follows; "All the *reſt* "of my "lands tenements "and *hereditaments* "either "freehold or "copyhold "whatſoever "and whereſoever and "alſo all my "goods &c "*after payment of my juſt debts and funeral expences*, "I give, deviſe, and "bequeath "the *ſame* "unto my "wife *S.* "*C.*" Held that under this deviſe *S. C.* took a fee.

The Defendant in this caſe having obtained judgment in his favour in the Court of King's Bench (*ſee* 5 *T. R.* 558.) on a former ejectment in which he was Plaintiff, this ſecond ejectment was brought by the preſent Plaintiff in error, with a view to queſtion that judgment (*ſee* 6 *T. R.* 175.) The ſpecial verdict in this was the ſame as in the former caſe, and the queſtion was, Whether under the will of *J. Carr* who was ſeized in fee of the premiſes in queſtion, *Siſſily Carr* under whom the Plaintiff in error claimed, took an eſtate in fee or for life only? The words of the deviſe were, "I give and deviſe unto *N. Liſter*, of &c. all that my "cuſtomary or copyhold meſſuage or tenement with the appurtenances ſituate &c.; All the *reſt* of my lands tenements and hereditaments either freehold or copyhold whatſoever and whereſoever and "alſo all my goods chattels and perſonal eſtate of what nature or "kind ſoever, *after payment of my juſt debts and funeral expences*, I "give deviſe and bequeath the *ſame* unto my wife *Siſſily Carr*; "and I do hereby nominate and appoint her my ſaid wife ſole executrix of this my will."

The caſe was twice argued; 1ſt, in *Trinity* Term 1796 by *Lambe* for the Plaintiff in error, and *Wood* for the Defendant, and now by *Chambre* for the former, and *Law* for the latter.

Arguments for the Plaintiff in error. To any common mind it is clear upon the face of the will that the teſtator intended to give to his wife all which he had not given to *N. Liſter*, and the words which he has employed are ſufficient to paſs a fee. The word "hereditaments," (which is uſed in the clauſe of deviſe to *S. Carr*, though not in that to *N. Liſter*) imports a deſcription not of the thing but of the intereſt; it means an inheritance, and had the teſtator given "all his inheritance," a fee would have paſſed in the

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ſame manner as if he had ſaid "all his eſtate" (*a*). [*Eyre* Ch. J. obſerved that the words "all his eſtate" may, but do not neceſſarily paſs a fee, and *Heath* J. that where they are words of deſcription they do not.] In *Holdfaſt* v. *Marten*, 1 *T. R.* 411. the word "eſtate" was held to carry a fee though it denoted locality, being "my eſtate at *B.*" and in *Fletcher* v. *Smiton*, 2 *T. R.* 656. the word "eſtates" in the plural number, had a like import given to it though the caſe was ſtill ſtronger as the teſtator had before by the ſame deſcription given an eſtate for life. The meaning of the word "hereditaments" in a will, may be collected from *Lydcott* v. *Willows*, 3 *Mod.* 229. where *Powell* J. contrary to the opinion of the reſt of the court, held that it imported an inheritance and would carry a reverſion; and his opinion was afterwards confirmed in the *Exchequer Chamber* where the judgment below was unanimouſly reverſed, 2 *Vent.* 285. S. C.; and though *Gould* J. in *Smith* v. *Tindal*, 11 *Mod.* 103, 4., where the word "hereditaments" was uſed in a deviſe and a perpetual charge created upon the eſtate, decided entirely on the charge in favour of a fee, yet *Holt* Ch. J. expreſsly founded his opinion on the word "hereditaments," as carrying a fee. So in *Frogmorton & Wright* v. *Wright and another*, 3 *Wilſ.* 418. *De Grey* Ch. J. held that the word "hereditaments" in a will may be a fee. Of *Canning* v. *Canning*, *Moſ.* 240. which has been cited to ſhew that a fee will not paſs under this word, it may be obſerved that the *Maſter of the Rolls* there went on the caſe of *Hopewell* v. *Ackland*, *Salk.* 239. (which does not apply here, as the deciſion proceeded on other words there uſed in the deviſe) and on the intention of the teſtator. Beſides Lord *Mansfield*, 5 *Bur.* 2629. treats *Moſeley* as a book of no authority. It was indeed truly obſerved by *Buller* J. in *Doe d. Palmer* v. *Richards*, 3 *Term Rep.* 360. that different opinions had been entertained on the operation of the word "hereditaments (*b*)." The ſtrongeſt authorities are however in our favour. If indeed the word be limited it may carry an eſtate for life; but where uſed generally it will paſs a fee. If however the word "hereditaments" will not paſs a fee, ſtill the generality of the ſweeping clauſe in this deviſe will do it. The teſtator had but two objects of his bounty, *N. Liſter* and his wife; the latter was the principal object,

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(*a*) *Vid. Willes*, 296. and the caſes on this ſubject there collected by the learned Editor in the note. *Vid. etiam Hogan* v. *Jackſon*, *Cowp.* 306. and what is ſaid by the court on the operation of the word "eſtate," in *Whitelock* v. *Haddon*, *ante*, 247, 8.

(*b*) *Vide* what is ſaid by *Buller* J. *ante* 248.

as he made her executrix and reſiduary legatee. If then his intention is clear and there is no rule of law to control it, that intention muſt prevail. What that is, appears clearly from the clauſe directing the payment of debts and legacies; for where the executorſhip might poſſibly become a burden without a fee, the Court will imply that a fee was intended to be given. 3 *Bur.* 1535. *arg.* It cannot be ſaid that nothing but the perſonalty was charged, for if that were not ſufficient any court would hold the land liable. The deviſe of the realty does not end at the word "whereſoever," for no words of diſpoſition occur until after the deſcription of the perſonalty. The ſentences are coupled by the word "and;" and the word "ſame" in the diſpoſing part refers to the real as well as perſonal eſtate. [*Heath* J. *Cliffe and others* v. *Gibbons*, 2 *Ld. Raym.* 1324. is in point; the teſtator there having deviſed to his wife the reſidue of his eſtate after debts and legacies paid, Lord Chancellor *Cowper* was clearly of opinion that a fee paſſed.] The caſes cited to ſhew that the executrix does not take a fee in reſpect of the charge are not applicable; in *Eyles* v. *Cary*, 1 *Vern.* 457. no queſtion was raiſed about the fee, and in *Dickins* v. *Marſhall*, *Cro. Eliz.* 330. the effect of charging debts, *&c.* on the land was not conſidered. Beſides the reporter of the latter caſe was at that time young, and it may be further impeached by the improbability of the 2d reſolution, *viz.* that the parties took as joint-tenants. The caſe of *Doe d. Palmer* v. *Richards* is deciſive, for the words "thereout paid" as applied to payment of debts, *&c.* uſed in that caſe, are equivalent to the words here "after payment," *&c.*

Arguments for the Defendant in Error. The Court will not diſinherit the heir at law without expreſs words to that effect. Now whatever the teſtator's intention might have been, there are no words which can be held to give more than an eſtate for life to *Siſſily Carr.* Indeed the deviſes to *N. Liſter* and to her are nearly alike, and the former is admitted on all hands to paſs only an eſtate for life. The words "whatſoever and whereſover" in the latter deviſe apply only to quality and place, not to duration of intereſt; and as to the word "hereditaments" not being uſed in the deviſe to *N. Liſter*, the ſubject of that deviſe was but a meſſuage. In all the caſes cited to ſhew that the word "hereditaments" carries a fee, there was a perpetual charge on the eſtate, and that weighed with the judges. The caſe of *Hopewell* v. *Ackland* is preciſely ſimilar to this; there the fee was expreſsly held not to paſs under the clauſe in which the word "hereditaments" was uſed, but under that which gave all that the teſtator had not before diſpoſed of. The terms "reſt and reſidue" occurred in *Canning* v. *Canning*, yet there only a life eſtate was given*; and though the principal point in that caſe is not perhaps applicable to this, and the reporter not good, ſtill the *Maſter of the Rolls* cannot well have been miſtated who treated it as a ſettled point that the word "hereditaments" would not paſs a fee. The definition of *hæreditas* by the civilians is, "what a man inherits;" *hæreditamentum* is uſed to expreſs "what a man tranſmits." *Hopewell* v. *Ackland* is expreſsly in our favour. All the caſes which have been cited to explain the word hereditaments as carrying a fee, were attended with other circumſtances which influenced the judgments. In *Lydcott* v. *Willows*, as reported in 3 *Mod.* 229. there was ſome comment on the word "hereditaments," but no deciſion; and in 2 *Vent.* 285. that word was not diſcuſſed. Beſides, the deciſion was to enable the wife to pay legacies, and went upon the charge. So in *Smith* v. *Tindal* there were words of charge, and the caſe was not determined on the meaning of the word "hereditaments." So *De Grey* Ch. J. in 3 *Wilſ.* 418. and *Buller* J. 3 *Term Rep.* 360. only ſay that "hereditaments" may paſs a fee when coupled with other words. Are there then other words in this deviſe ſufficient to give that effect to "hereditaments?" The deviſe of the realty ends at the word "whereſoever;" nor is it common to charge funeral expences on the real eſtate. The charge therefore only relates to the perſonal eſtate, which is the proper fund, as appears from *Eyles* v. *Cary*. And even ſuppoſing the realty to be charged, a fee will not neceſſarily paſs, becauſe the eſtate may be given ſubject to the charge into whatever hands it may come. In *Merſon* v. *Blackmore*, 2 *Atk.* 341. the debts being charged on the realty on the contingency of the perſonalty only not ſufficing, it was held that ſuch a charge would not raiſe the eſtate into a fee. In *Doe d. Palmer* v. *Richards*, the deviſee was to pay *out* of the particular eſtate deviſed. Here if the deviſee had died in the life of the deviſor, the lands would have gone to the heir, ſubject to the charge. The only difference between this caſe and *Dickens* v. *Marſhall* is, that here the deviſe is after payment of debts and *funeral expences*, and there it was after payment of debts and *legacies*; and yet it was there held that an eſtate for life only paſſed. With reſpect to the words "*all the reſt* of my lands," &c. though *Wheeler* v. *Walroone*, *Alleyn*, 28. is an authority to ſhew that ſuch words paſs a fee not expreſsly deviſed, yet the authority of the report in *Alleyn* is much ſhaken by the obſervation in

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3 *P. Wms.* 63. note [E], that on inſpection of the record it appeared to have been found by the ſpecial verdict, that unleſs the reverſion in fee paſſed by the will there would not be ſufficient to pay the teſtator's debts.

Eyre Ch. J. I ſhould feel much difficulty in deciding this caſe upon the technical meaning of the word "hereditaments." I am diſpoſed, however, to agree that the word "hereditaments" imports only to be a deſcription of that in which the deviſor has an inheritance, not of his intereſt in it. No doubt a life eſtate may be given to the deviſee out of an eſtate in which the deviſor has himſelf a fee. But the queſtion will be, Whether the reſt and reſidue of my lands, *&c.* may not include all the intereſt, when uſed in a reſiduary clauſe? Undoubtedly a life eſtate might have been expreſsly given in the reſt and reſidue, *&c.* and then the words "reſt and reſidue" would have been merely deſcriptive of the lands. The queſtion before us is a queſtion of intent, and does not ariſe upon the technical ſenſe of the words. It does not indeed appear to me that an intent to give a fee can be implied from the words "after payment of my debts and funeral expences," for no ſuch abſolute charge is created as will render it neceſſary that a fee ſhould paſs. But it is fairly to be collected that the teſtator intended to give his wife all that was not before deviſed. For this purpoſe he employed the moſt comprehenſive words: "hereditaments" imports all that in which he had an eſtate of inheritance; and the words "reſt and reſidue" are ſufficient to paſs the whole intereſt, if the intent be clear. This appears from the caſes where an intent has been raiſed from introductory words (*a*). Here one copyhold is given to *N. Liſter*, and then comes this ſweeping clauſe: "All the reſt of my lands, tenements, and hereditaments whatſoever and whereſoever, and alſo all my goods, chattels, and perſonal eſtate of what nature or kind ſoever, after payment of my juſt debts and funeral expences, I give, deviſe, and bequeath the *ſame* unto my wife *S. Carr.*" The whole perſonal eſtate, together with all the *reſt* of the real eſtate, after payment of debts and funeral expences, is given to the deviſor in this one clauſe. What is this but ſaying, "I will firſt have my debts and funeral expences paid, and then I give what is left to the

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(*a*) On the general effect of introductory words in a will, ſee *Ibbetſon* v. *Beckwith*, *Caſ. temp. Talbot*, 160. *Maudy* v. *Maudy*, *Caſ. temp. Hardw.* 142. 2 *Str.* 1020 S. C. *Frogmorton d. Wright* v. *Wright*, 2 *Bl.* 889. 3 *Wilſ.* 414. S. C. *Loveacres d. Mudge* v. *Blight et ux. Cowp.* 352. *Denn d. Gaſkin* v. *Gaſkin*, *Cowp.* 657. *Goodright d. Baker* v. *Stocker*, 5 *Term Rep.* 13. and *Doe d. Child et ux.* v. *Wright*, 8 *Term Rep.* 64. For their effect as operating on the reſiduary clauſe of a will, ſee *Grayſon* v. *Atkinſon*, 1 *Wilſ.* 333. *Hogan* v. *Jackſon*, *Cowp.* 299. and *Doe d. Burkitt* v. *Chapman*, 1 *H. Bl.* 223.

deviſee. If the intent be clear, there are apt words ſufficient for the purpoſe. Therefore, without defining the meaning of the word "hereditaments," we think that the plain intent of the teſtator makes it neceſſary to give this import to the deviſe.

Per Curiam, Judgment reverſed.

(In the *Exchequer Chamber*.)

Haille *v.* Smith and Another, in Error.

Nov. 16th.

A. of *Liverpool* wiſhing to draw upon the banking-houſe of *B.* in *London* to a large amount, agreed, among other ſecurities given, to conſign goods to a mercantile houſe conſiſting of the ſame partners as the banking-houſe, though under the firm of *B.* & *C.*; accordingly he remitted the invoice of a cargo and the bill of lading indorſed in blank to *B.* & *C.*, but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became bankrupt, being conſiderably indebted to *B.* and the cargo was delivered to his aſſignees by the Captain; held that *B.* & *C.* might maintain trover for it againſt the Captain.

This was an action of trover brought in the *King's Bench* by the Defendants in Error, to recover from the Plaintiff in Error, as Captain of the ſhip *Hawke*, a cargo of iron and hemp. The cauſe was tried before *Lawrence* J. at the ſummer aſſizes for *Lancaſter* 1794, and a verdict found for the Defendants in Error for 4710*l.* 18*s.* Upon this a bill of exceptions was tendered by the Counſel for the Plaintiff in Error, and ſealed by the learned judge. From that bill of exceptions, when annexed to the record in this court, the caſe appeared to be as follows:

The Defendants in Error were merchants and bankers reſiding in *London* and carrying on buſineſs under two different firms, namely, the banking buſineſs under the firm of *Samuel Smith*, *Sons*, and *Co.*, and the buſineſs of merchants under the firm of *Smiths* and *Atkinſon*. *George* and *Henry Brown*, merchants at *Liverpool*, ſome time ſince opened an account with *Samuel Smith*, *Sons*, and *Co.* as bankers, in the regular courſe of buſineſs, remitting bills, and drawing againſt them as occaſion required. In *January* 1793, *G.* and *H. Brown* wiſhing to increaſe their drafts to a much greater amount than had been at firſt deſired or intended by *Samuel Smith*, *Sons*, and *Co.* entered into an agreement with them to the following effect: that *G.* and *H. Brown* ſhould be at liberty to draw 5000*l.* *per* week from the 1ſt of *February* to the 12th of *March* upon *Samuel Smith*, *Sons*, and *Co.* remitting them good bills of exchange on *London* to cover the amount; and that as a further ſecurity they ſhould lodge a credit with two houſes at *Hamburgh* againſt goods conſigned to thoſe houſes to the amount of 20,000*l.* of which *Samuel Smith*, *Sons*, and *Co.* might avail themſelves as they ſhould think proper; and *alſo as a collateral ſecurity conſign to the houſe of* Smiths *and* Atkinſon *hemp and iron to the amount of* 10,000*l.* *on ſale for their account.* This agreement was entered

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into for the accommodation of *G.* and *H. Brown*, and entirely at their requeſt. In conſequence of this *G.* and *H. Brown* did draw upon *Samuel Smith*, *Sons*, and *Co.* to a conſiderable amount; and in purſuance of the agreement on the 13th of *February* 1793 remitted to *Smiths* and *Atkinſon* the invoice and bill of lading indorſed in blank of the ſhip *Hawke* of which the Plaintiff in Error was captain, and for the cargo of which this action was brought. In the correſpondence which took place between *Smiths* and *Atkinſon* and *G.* and *H. Brown*, ſubſequent to this remittance, the former applied to the latter for directions reſpecting the diſpoſal of the goods and the prices they might be willing to take. An inſurance was effected on the cargo in the name of *Smiths* and *Atkinſon*, who were to receive the uſual commiſſion on the ſale. At the time when the invoice and bill of lading were remitted the *Hawke* was in the port of *Liverpool* and ready to ſail for *London*, but was prevented from ſailing by an embargo. *Samuel Smith*, *Sons*, and *Co.* having in conſequence of the credit lodged in their favour with the houſes at *Hamburgh* drawn upon thoſe houſes, and having had ſeveral of their bills returned from thence proteſted for non-payment, immediately applied to their own uſe a parcel of bills remitted to them by *G.* and *H. Brown* on the 2d of *March* 1793, and refuſed to accept the bills drawn by *G.* and *H. Brown* upon them at the ſame time. At this period, and on the 5th of *April* 1793, when *G.* and *H. Brown* were declared bankrupts, the balance of accounts was conſiderably in favour of *Samuel Smith*, *Sons*, and *Co.* In conſequence of the bankruptcy *Smiths* and *Atkinſon* having demanded of the captain the cargo of the ſhip *Hawke* which was ſtill lying in the port of *Liverpool*, and tendered the charges, the latter refuſed to deliver it to them, alleging orders to that effect from the aſſignees of *G.* and *H. Brown*, to whom he afterwards delivered it. The Defendants in Error called two eminent merchants to prove that bills of lading, when made out to the order of the ſhipper or his aſſigns, are negotiable or transferable by the ſhipper's indorſement, which veſts the property in the indorſee; and that when ſuch bills of lading are tranſmitted from abroad, it is uſual for merchants to accept bills in conſequence of them, before the arrival of the goods. Upon this evidence the learned Judge directed the jury that the conſignment of the cargo of the ſhip *Hawke* to *Smiths* and *Atkinſon* was not a conſignment to them as the factors or agents only of *G.* and *H. Brown* acting merely for the benefit of their principals, but was a conſignment to *Smiths* and

Atkinſon not only to ſell the ſame under the direction of *G.* and *H. Brown*, but alſo by the produce thereof to protect and indemnify the banking-houſe of *Samuel Smith*, *Sons*, and *Co.* againſt their advancements and acceptances on account of *G.* and *H. Brown*, and that the law, as between principal and factor, did not ariſe in this caſe: that if, therefore, they believed the evidence ſhewn of the cuſtom of merchants with reſpect to the transfer of a bill of lading, then the Plaintiffs, (now Defendants in Error,) were entitled to the cargo, and the captain's refuſal to deliver was evidence of a wrongful converſion. To this direction the bill of exceptions was tendered.

This caſe was twice argued; in *Eaſter* Term 1796, by *Chambre* for the Plaintiff in Error, and *Lowndes* for the Defendant; and again on this day by *Law* for the former and *Wood* for the latter.

Arguments for the Plaintiff in Error. The firſt obſervation that preſents itſelf in this caſe ariſes on the negotiability of a bill of lading by indorſement; with reſpect to which point we muſt refer the Court to the ſeveral reports of *Lickbarrow* v. *Maſon* (*a*), where the ſubject was completely exhauſted. We contend, indeed, that the direction of the learned Judge upon that point was incorrect; for the queſtion, Whether ſuch an inſtrument be negotiable or not? is part of the law of merchants, and as ſuch ought not to have been ſubmitted to the jury. *Grant* v. *Vaughan*, 3 *Burr.* 1523. and *Pillans & another* v. *Van Mierop & another*, 3 *Burr.* 1669. The next conſideration will be, whether, under the circumſtances of this caſe, there was ſuch a negotiation or aſſignment as amounted to a complete transfer of the property, or whether the conſignor and conſignee did not ſtand in that relation to each other, in which the law, as between principal and factor, applies. Admitting that by virtue of the indorſement of a bill of lading property *prima facie* paſſes, ſtill that indorſement is capable of being ſo explained by evidence as to ſhew the indorſer's intent to paſs ſome minor intereſt, or qualified authority, in reſpect of the goods. In ſupport of this the opinion of Lord *Mansfield* in *Wright* v. *Campbell*, 4 *Burr.* 2050. may be referred to. The effect of an indorſement on a bill of lading cannot be more general than that of an indorſement of a bill of exchange: now the latter may be indorſed for various purpoſes;

(*a*) Judgment for the Plaintiff in *K. B.* 2 *Term Rep.* 63. That judgment reverſed in the Exchequer Chamber, 1 *H. Bl.* 357. *Venire de novo* awarded in the Houſe of Lords, 2 *H. Bl.* 211. and 5 *Term Rep.* 367. Special verdict on the ſecond trial and judgment for the Plaintiff in *K. B.* 5 *Term Rep.* 683.

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as to apply the contents to the indorſer's uſe, to a ſervant to bring the contents to his maſter, or to an agent for the purpoſe of enabling him to execute ſome particular buſineſs to which he is bound to apply it. In any of theſe caſes, if the bill has not paſſed into the hands of a third perſon, the indorſee is precluded from maintaining an action on the bill againſt the indorſer; for the latter is at liberty to ſhew the purpoſe for which it was indorſed. The preſent tranſaction is confined to the original parties; and however third perſons who might have given credit to the inſtrument in queſtion, would have been protected, that conſideration does not ariſe here. From all the facts of this caſe taken together, it is clear that theſe parties do not ſtand in the relation of vendor and vendee; nor was it underſtood, at the time when the indorſement was made, that a complete transfer of the property would thereby be effected. By the original agreement the conſignments of goods were only to reſt with the houſe of *Smiths* and *Atkinſon* as a collateral ſecurity for the benefit of the banking-houſe. The goods themſelves, therefore, were to continue the property of the conſignor till the ſale, and the money ariſing from thence was either to be retained by *Smiths* and *Atkinſon*, or paid into the banking-houſe as occaſion ſhould require. Up to the time of the ſale the charges attending theſe goods, and the riſk of the conſignment, lay upon the conſignor. It is true that the conſignees may have had an inſurable intereſt in reſpect of their commiſſion; but ſtill, if the conſignors alſo had an inſurable property, trover is not maintainable by theſe parties for a converſion by the captain acting under the orders of the owners. Did the conſignors, in conſequence of remitting the bill of lading to perſons ſtanding in the qualified relation to them in which *Smiths* and *Atkinſon* ſtood, loſe all power and control over the cargo? The right of the conſignee attaches only on the arrival of the cargo at the port of deſtination, and till that period the conſignor has ſuch a property as enables him to detain; for if he has a property which may be the ſubject of inſurance, that, accompanied with poſſeſſion, enables him to detain. That *G.* and *H. Brown* had an inſurable intereſt appears from *Hibbert* v. *Carter*, 1 *Term Rep.* 745. Conſidering the conſignment to *Smiths* and *Atkinſon* in the light of a conſignment to them as factors, and made by way of indemnity for advances, the caſe comes within all the reaſons upon which that of *Kinlock* v. *Craig*, 3 *Term Rep.* 119. & 783. was decided: there it was held, that if a factor, in conſideration of goods being conſigned to him, accept bills drawn by the conſignor, and pay part of

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of the freight, and become inſolvent before the bills are due, and before the goods get into his *actual* poſſeſſion the conſignor may ſtop them *in tranſitu.* The principal caſe is even ſtronger than that, for there the ſhip had arrived at the port of delivery, whereas here it had never migrated from the port of loading. In *Lickbarrow* v. *Maſon*, 2 *Term Rep.* 72. Mr. J. *Aſhhurſt* obſerves, that where delivery is to be at a diſtant place, the contract, as between the vendor and vendee, is ambulatory till delivery, though not as between the vendor and third perſons if a bill of lading has been remitted. If therefore this caſe be conſidered as between vendor and vendee, no third perſons having intervened, the contract muſt here be conſidered ambulatory till actual delivery. It is the courſe of trade to make out two or three bills of lading; according to the terms of the bill of lading the captain is to deliver to the ſhipper or his aſſigns; and when there are different claimants upon different bills of lading, it is not his buſineſs to examine who has the beſt right. *Fearon* v. *Bowers*, cited per Lord *Loughborough* in *Lickbarrow* v. *Maſon*, 1 *H. Bl.* 365. The captain therefore, in the preſent caſe, ſatisfied his contract by a delivery to the aſſignees of the ſhipper. In addition to this, it may be contended that the property never veſted in *Smiths* and *Atkinſon*, becauſe the banking-houſe never executed their part of that agreement under which the conſignment was made. The bills of *G.* and *H. Brown* having been diſhonoured they were entitled to ſtop the conſignment in the port of *Liverpool.*

Arguments for the Defendants in Error. When a cuſtom has once been found to be a cuſtom of merchants, it becomes by that finding the law of the land. This doctrine was acted upon by Lord *Kenyon* in the caſe of *Hunter* v. *Buring* (tried at the ſame ſittings in which the ſecond trial of *Lickbarrow* v. *Maſon* had taken place), who refuſed to hear any evidence reſpecting the negotiability of a bill of lading, it having been already admitted upon record in the ſpecial verdict in *Lickbarrow* v. *Maſon.* That ſpecial verdict therefore, as reported 5 *Term Rep.* 683., is an authority to ſhew that bills of lading are negotiable. If *Smiths* and *Atkinſon* had ſtood in the mere relation of factors to *G.* and *H. Brown* as their principals, undoubtedly they could have had no lien upon the goods for the balance of their account until they had come into their actual poſſeſſion. But though that be law as between principal and factor, yet where one transfers goods to another in truſt to indemnify a third perſon againſt money which he may advance

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that law does not apply, becauſe the property immediately veſts in the truſtee in whom it is intended to veſt. Here the agreement was that *G.* and *H. Brown* ſhould conſign hemp and iron to *Smiths* and *Atkinſon*, the meaning of which agreement was that the former ſhould transfer to the latter, by the uſual mercantile mode of transfer, goods in truſt to be ſold, and the produce to be retained as a collateral ſecurity for what the banking-houſe ſhould advance. The mode of transfer adopted, namely, the indorſement of a bill of lading in blank, was an adequate mode of transfer. For a mere agreement for one to ſell and the other to buy a ſpecific thing will paſs the property in chattels without actual delivery if the conſideration be paid. It is true that the vendor has a right to ſtop *in tranſitu* where the conſideration has not been paid and is not likely to be paid; but that law cannot affect this caſe where there was no pretence to ſtop *in tranſitu*, as the banking-houſe had actually paid by advances the value of the goods. Upon this head there are many caſes. In *Keilw*. 77. *pl.* 25. it is ſaid that if a man buy twenty quarters of malt which is put into ſacks or otherwiſe ſevered from the other malt, the property is altered. So in *Evans* v. *Martell*, 12 *Mod.* 156. the court ſay that the conſignment in a bill of lading gives the property; and in *Grips* v. *Ingledew*, *Farreſley* 89. it was held that under an agreement to pay ſo much for every hundred ſtacks of wood lying in ſuch a wood, and ſo for more as it ſhould be felled, the property of every hundred cut at the time of the agreement veſted in the purchaſer, and ſo of the reſt as they were cut down. There is alſo a caſe cited in *Evans* v. *Thomas*, *Cro. Jac.* 172. "one covenants with another, that if he will marry his daughter he ſhall have ſuch a flock of ſheep; he marries his daughter; the property of the ſheep was preſently in him becauſe it was but a perſonal thing and the covenant is a grant (*a*)." Again in an action on the caſe upon mutual agreements a note was given in evidence in the nature of a bill of parcels, expreſſing that *A.* had bought of *B.* one hundred pieces of muſlins at forty ſhillings *per* piece to be fetched away by ten pieces at a time, and paid for as taken away; there *Holt* C. J. at *Guildhall*, held that the pieces being marked and ſealed, the property was altered immediately, and that they remained only as a ſecurity for the money. *Knight* v. *Hopper*, *Skinn.* 647. Indeed in *Lickbarrow* v. *Maſon*, Lord *Loughborough* ſays, "A deſtination of the goods "by the vendor to the uſe of the vendee, the marking them, or

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(*a*) See *Fitz. Abr. Monſtrans de faits*, *pl.* 144.

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"making them up to be delivered, or removing them for the "purpoſe of being delivered, may all entitle the vendee to act as "owner to aſſign and to maintain an action againſt a third perſon "into whoſe hands they have come." 1 *H. Bl.* 363, 364. Upon theſe authorities it may be contended, that the inſtant the deſtination of theſe goods was aſcertained, and they were put on board in order to be delivered to *Smiths* and *Atkinſon*, the property was immediately transferred to them, becauſe a valuable conſideration had already moved from them. This ſpecific property being once aſcertained, they were thereby enabled to maintain trover for the goods, unleſs *G.* and *H. Brown* or their aſſignees could have ſhewn a juſt cauſe for retracting the delivery. It may alſo be argued, that the cargo having been delivered by *G.* and *H. Brown* to the Defendant for the uſe of the Plaintiffs upon a good preceding conſideration, the Defendant may be looked upon as a truſtee for the benefit of the Plaintiffs. In *Brand* v. *Liſley*, *Yelv.* 164. *A.* being indebted to the Plaintiff in 100*l.* for the ſatisfaction of the debt delivered to the Defendant ſundry goods amounting to the value of the debt; and it was adjudged, that by the delivery of the goods to the Defendant to ſatisfy the Plaintiff, the Plaintiff acquired a property and intereſt in the goods. To the ſame effect are 1 *Bulſtr.* 68. 2 *Leon*, 89, *Dyer* 49, *a.* Nor can any diſtinction be made on the ground of the property having been transferred to *Smiths* and *Atkinſon* as conſignees, inſtead of the very houſe whoſe advances the conſignment was deſigned to cover. The former were to ſell the goods for the ſpecial purpoſe of indemnifying the latter by the proceeds, and till that ſale *G.* and *H. Brown* were to ſtand the riſk, and to provide the fund from which the contingent charges were to be defrayed. This accounts for the inſurable intereſt in both parties. The conſignors had an intereſt in that property, which when ſold was to pay their debt, and the conſignees were intereſted in the ſame property, becauſe it was the ſecurity on which their advances were made. In the caſe of *Kinloch* v. *Craig* principally relied on by the Plaintiff in Error, the bill of lading was not indorſed; indeed that was merely a caſe of principal and factor, whereas here there was an actual transfer of the property in truſt to indemnify the banking-houſe, and that property was paid for before the transfer took place.

Eyre Ch. J. The caſe is now brought to a point in this one ſhort propoſition, *viz.* That the property was transferred to *Smiths* and *Atkinſon* upon a truſt in which thoſe who transferred the property, and the banking-houſe were concerned. If this can be main-

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maintained, all the objections which occur ſo forcibly upon the notion of a bargain and ſale, will be removed. Had it been a bargain and ſale accompanied with a ſufficient delivery to transfer the property, from that moment the riſk of the conſignment and the loſs and profit upon it ought to have belonged to the buyers. But if we can ſuppoſe that this transfer of property was to ſtand ſimply upon the agreement that the cargo ſhould go to *Smiths* and *Atkinſon*, and ſhould be in effect their property only, for the purpoſe of their applying the net proceeds by way of indemnity to the banking-houſe, then the circumſtances of the riſk and of the profit and loſs refer to the truſt with which the property was charged, and are thereby accounted for. The truſt being, that the proceeds, whatever they might be, ſhould remain with the conſignees applicable to the debt of the banking-houſe, the riſk muſt neceſſarily remain with the conſignors notwithſtanding the change of property, and they muſt ſuffer or be benefited by the loſs or profit upon the ſale. The queſtion then is, Whether upon the caſe before us we are authoriſed to decide, that by the agreement of the parties for a valuable conſideration this, which was originally the property of the conſignor's, did become the property of *Smiths* and *Atkinſon*, charged with the above-mentioned truſt? And here the bill of lading operates as in my poor judgment it ought to operate. It operates as evidence of the change of property, and as ſuch I have no difficulty, nor ever had, in giving it its full effect. Ninety-nine times in an hundred the indorſement of a bill of lading will be concluſive evidence of the alteration of property without aſcribing to it the effect of a legal inſtrument as a bill of ſale. Caſes may ariſe in which it will be difficult to underſtand that ſuch was the meaning of the parties. Here, however, there was an agreement, that as a large credit was to be given by the banking-houſe to *G.* and *H. Brown*, they ſhould put into the hands of *Smiths* and *Atkinſon*, as merchants, a certain quantity of goods, the proceeds of which ſhould remain as a depoſit in order to ſecure that credit. From the moment then that the goods were ſet apart for this particular purpoſe, why ſhould we not hold the property in them to have been changed, it being in perfect conformity to the agreement, and ſuch an execution thereof as the juſtice of the caſe requires? One difficulty had indeed occurred to me, namely, that if this bill of lading ſo indorſed was at all events to change the property; if of its own force without reference to any particular agreement it was to operate as a transfer, then if the banking-houſe had become debtors to the conſignors, and had become inſolvent, the effects of the conſignors would have gone to pay their debts. The injuſtice of this ſeemed ſo flagrant, that I felt great difficulty in acceding to a propoſition attended with ſuch conſequences. But I ſee no reaſon why we ſhould not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the ſubſtance of that agreement into execution. This will lead to the concluſion, that the moment the goods were put on board the *Hawke*, and the bill of lading was indorſed and remitted to *Smiths* and *Atkinſon*, the property was changed, and was to remain in their hands cloathed with the truſt expreſſed in the agreement. In this view of the caſe, the circumſtance of the riſk remaining in the conſignors will only relate to the manner in which the truſt was to be carried into execution. The profit or loſs at which the goods might be ſold would affect the advantage which the conſignors were to derive from the truſt; but ſtill the riſk of the conſignors in that reſpect affords no objection to the exiſtence of the truſt itſelf: I therefore feel the ground of argument, as it now ſtands before us, much changed from what it appeared to be; and ſhall have no difficulty in holding that this cargo was veſted in *Smiths* and *Atkinſon*, notwithſtanding the riſk remained in thoſe who transferred the cargo, and notwithſtanding that cargo was to be ſold with a view to the profit or loſs of the conſignors. Thoſe circumſtances will not prevent a transfer of the property under the agreement, which was for a valuable conſideration; though I can by no means aſſent to the propoſition, that the agreement, though for a valuable conſideration, will amount to any thing like a bargain and ſale.

Per Curiam, Judgment affirmed.

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Nov. 18.

If a *fi. fa.* be *teſte*'d before Defendant's death, but delivered to the ſheriff and executed after, the execution is regular.

Judgment in this caſe was ſigned on the 23d of *May*; on the 29th of the ſame month the Defendant died, and on the 31ſt a *fi. fa.* *teſte*'d previous to the Defendant's death was lodged in the office of the ſheriff of *Middleſex*: under this the ſheriff levied.

Clayton Serjt. on a former day obtained a rule to ſhew cauſe why the *fi. fa.* ſhould not be ſet aſide for irregularity, and why the money produced by a ſale of the goods which remained in the hands

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of the ſheriff ſhould not be reſtored to the adminiſtrator of the Defendant. He contended, that the *fi. fa.* being lodged in the office ſubſequent to the death of the Defendant, the execution thereon was irregular, and cited *Heapy* v. *Parris*, 6 *Term Rep.* 368. where the *teſte* was after the death of the party; and *Walker* v. *Drawwaters*, *E.* 36 *Geo.* 3. in *Scacc.* (*a*), where the ſame doctrine was held, though the *teſte* was before the death of the party. He inſiſted alſo that the judgment here ſhould have been revived by *ſcire facias*, ſince the adminiſtrator, who was a ſtranger in this caſe, was to be affected by it. In ſupport of this he relied on *Pennoir* v. *Brace*, 1 *Salk.* 319. (*b*) where it is ſaid by the Court, that "where any new perſon is "either to be better or worſe by the execution, there muſt be a "*ſcire facias*, becauſe he is a ſtranger, to make him party to the "judgment, as in caſe of executor and adminiſtrator;" and on Lord *Kenyon*'s opinion in *Heapy* v. *Parris*. He added, that the Defendant here died inſolvent, leaving bond and other creditors, for whom the adminiſtrator was to be conſidered as truſtee; and therefore, by the ſtatute of frauds, the writ could only bind from the delivery to the ſheriff (*c*).

Shepherd Serjt. *contra*, cited *Houghton* v. *Ruſhby*, *Skin.* 257. *Comb.* 33. S. C. *Springer* v. *Somerville*, *Bunb.* 271. and Dr. *Needham*'s caſe, *ibid.* in the note.

BULLER J. read a caſe of *Dakin* v. *Cartwright*, *Hil.* 12 *Geo.* 2. *K. B.* (*d*) from a manuſcript note, and ſaid that *Walker* v. *Drawwaters* was decided on a miſconception of what had been done in the *King's Bench*. He referred alſo to 3 *P. Wms.* 400. and 2 *Eq. Caſ. Abr.* 381.

The Court were of opinion, that the current of authorities was againſt the application on the 1ſt ground, and that to make a *ſcire facias* neceſſary to ſupport this execution, the proceſs muſt *appear* to have iſſued after the death of the party: that with reſpect to the creditors, though the property in the goods of the deceaſed was not bound till the delivery of the writ to the ſheriff, yet the right of

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(*a*) See 3 *Anſtruth. Rep.* 630.

(*b*) But it was alſo held in that caſe that the death of a party is not material, if ſubſequent to the *teſte*.

(*c*) 29 *Car.* 2. *c.* 3. *ſ.* 16.

(*d*) The caſe of *Dakin* v. *Cartwright* was not preciſely in point: but according to Mr. Juſtice *Buller*'s note, *Lee* C. J. there ſaid; "There was a caſe, *Mich.* 13 *W.* 3. *B. R.* *Gill* v. *Parſons*. Judgment was entered between *Hilary* and *Eaſter* Terms, after which Defendant died. Execution was taken out *teſte'd* the firſt day of *Hilary* Term, and the goods in the hands of the executor were taken. And on motion it was holden, that though a judgment in reſpect of purchaſers binds only from the ſigning, yet as to the party and his repreſentatives it binds as it did before at common law, and that the execution ſo *teſte'd* was therefore regular."

of the creditors to purſue that property till the delivery of the writ would not make this execution irregular.

Rule diſcharged (*a*).

FENN ex. dem. BLANCHARD *v.* S. WOOD, Executor of W. WOOD.

Nov. 21ſt.

If a declaration in ejectment be ſerved upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover ſuch premiſes as the tenant is proved to be in poſſeſſion of.

EJECTMENT tried at the ſummer aſſizes for *Kent* before Lord *Kenyon*: Verdict for the Plaintiff.

Early in this Term a rule *niſi* for a new trial was obtained on an objection ariſing out of the following circumſtances: On the 13th *February* 1795, *W. Wood* the Defendant's teſtator purchaſed of one *Farar* the remainder of a term of ſixty-one years in certain premiſes at *Sydenham*. A ſmall part of thoſe premiſes, with a wooden houſe ſtanding thereon, had been previouſly underlet for a term of fifty years to one *Blanchard* at the yearly rent of 17 *l.*, who had again underlet a part excluſive of the wooden-houſe for a term of forty-eight years and three-quarters to one *Oozman* at a ground-rent of 2 *l.* 2 *s.* *Blanchard* had covenanted with *Farar* to build a ſubſtantial houſe on ſome part of the premiſes demiſed to him; *Oozman*, when he took his leaſe from *Blanchard*, covenanted to perform this agreement for him. When *W. Wood* purchaſed of *Farar*, it was ſuppoſed that *Blanchard* had ſurrendered his intereſt, he having failed in the payment of his rent and delivered up the keys of the wooden houſe to *Farar*'s ſervants; but the leaſe ſtill remained in his poſſeſſion. *W. Wood* purchaſed of *Oozman* his intereſt in the houſe which he had built in purſuance of his agreement with *Blanchard*, but ſuffered him to continue in poſſeſſion as his tenant. He alſo pulled down the wooden houſe. Upon this *Blanchard*, with a view to recover his premiſes, ſerved *Oozman* alone with a declaration in ejectment; and the preſent Defendant, as executor to *W. Wood*, (who was deceaſed,) was admitted as landlord to defend. No ground-rent was in arrear from *Oozman* to

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(*a*) *Vide etiam Parkers* v. *Moſſe*, *Cro. Eliz.* 181. which was before the ſtatute of frauds, and the following caſes which were after: *Anonymous*, 2 *Vent*. 218. *Pennoir* v. *Brace*, 3d *Reſ.* 1 *Ld. Ray*. 244. 1 *Salk* 319. S. C. *Robinſon and others* v. *Tongue and others*, 2d *Reſ.* 3 *P. Wms*. 399. Lord *Winchelſea*'s caſe, note. *Ibid. Fawkes* v. *Atkinſon*, *Barnes*, 268. *ed.* 3 and *Tidd's Pr. K. B.* 728. *ed.* 1. 932. *ed.* 2. In *Robinſon* v. *Tongue* it was ſaid that the ſtatute of frauds concerns purchaſers only, and not creditors; and in *Houghton* v. *Ruſhby*, and *Springer* v. *Somerville*, that an execution of this kind is regular under the ſtatute of frauds which extends only to creditors and purchaſers, but not to executors and adminiſtrators who ſtand in the place of the party.

Blanchard. The leſſor of the Plaintiff only proved a title to the wooden houſe, and had a verdict for that. The objection to this verdict was, that *Oozman* alone having been ſerved with the ejectment, the rule under which the Defendant, as landlord, was admitted to defend, extended only to the premiſes of which *Oozman* was proved to be tenant in poſſeſſion, and not to any of which the Defendant himſelf was in poſſeſſion.

Le Blanc Serjt. ſhewed cauſe. It is objected to this verdict that the premiſes recovered were in *Oozman*'s poſſeſſion. If a declaration be ſerved on ſeveral tenants, and one landlord comes in to defend for one tenant, he muſt ſpecify the premiſes for which he defends; but in *Doe ex dem. Jeſſe* v. *Bacchus*, *Mich.* 30 *Geo.* 2. at ſittings *Bull. N. P.* 110. this diſtinction was taken, "that if there be but "one Defendant as tenant in poſſeſſion, the Plaintiff need not "prove him in poſſeſſion; becauſe if he was not, why did he enter "into the rule (*a*)." The whole, therefore, of theſe premiſes having been ſpecified in the margin of the common conſent rule, and not reſtrained by any deſcription in the rule by which the landlord was admitted to defend, he cannot complain of want of notice.

Shepherd Serjt. *contrà.* The common conſent rule muſt be conſtrued by the ſubſequent rule under which the landlord is admitted to defend. If that be not the caſe, the Plaintiff in ejectment may recover from the landlord lands at two different ends of the county holden by different tenants. Though by the common conſent rule the Defendant is bound to "confeſs leaſe, entry, and "ouſter of ſo much of the tenements ſpecified in the Plaintiff's "declaration as are in poſſeſſion of the Defendant or his tenant, "or any perſon claiming by or under his title," yet thoſe general expreſſions muſt, where the landlord defends for his tenant, be reſtrained to the premiſes in his tenant's poſſeſſion, and for which he has been ſerved. Beſides, the declaration in ejectment is narrowed by the notice of the caſual ejector. In *Smith ex dem. Taylor* v. *Mann*, 1 *Wilſ.* 220. it was expreſsly ruled, that where the landlord defends, the tenant muſt be proved to be in poſſeſſion of the premiſes; for it was ſaid that he does not admit himſelf to be landlord of any premiſes but of ſuch only as are in the poſſeſſion of his tenant.

(*a*) *Vide tam. Goodright* v. *Rich*, 7 *Term Rep.* 333. where that caſe was overruled. There Lord *Kenyon* alluded to the principal caſe as having been ruled by him upon the home circuit on the authority of *Jeſſe* v. *Bacchus*, but acknowledged his having adopted a contrary opinion upon reflection.

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Fenn ex dem. Blanchard v. Wood.

Eyre Ch. J. Perhaps this verdict may be right on principle; but it is objectionable on the ground of many practical difficulties. If a Plaintiff ſerve his declaration on one of ſeveral tenants, and the one ſerved appear and defend, he ſhould ſpecify in the rule for how much he defends; then if his landlord comes in, the declaration will be narrowed by the rule. But if this be omitted, as the declaration ſtates an ouſter from all the premiſes, and leaſe, entry, and ouſter is confeſſed generally, this ſeems to warrant the concluſion that the Defendant will loſe all to which the Plaintiff can make title. It is true, indeed, that on this theory, though the Plaintiff fail in his real object, yet he may recover other premiſes for which he did not intend to ſue. It is therefore proper that they ſhould be narrowed by the rule. The theory of the caſe in *Wilſon* may be wrong; but I think the deciſion highly convenient.

Buller J. The action of ejectment is founded on a fiction, and muſt not be allowed to work a wrong. It is brought for lands in poſſeſſion; and the tenant in poſſeſſion muſt be ſerved. If it be brought for five hundred acres, and four hundred and ninety-nine only are proved to be in the poſſeſſion of the Defendant, the odd acre cannot be recovered. Shall a Plaintiff, for the purpoſe of entitling himſelf to coſts, be allowed to take a verdict for that on which he can have no writ of poſſeſſion? It appears from the caſe in *Wilſon*, that when a landlord is made Defendant his tenant muſt be proved to be in poſſeſſion, and the Plaintiff can only recover the premiſes whereof he is poſſeſſed. Poſſeſſion is the baſis and foundation of the action.

Heath J. The 11 *Geo.* 2. *c.* 19. *ſ.* 13. was paſſed to enable landlords to defend that which their tenants only could have defended before the paſſing of the act, *viz.* that of which they were in poſſeſſion. The words of the act are, "If the landlord of any part of the lands, *&c. for which ſuch ejectment was brought*, ſhall deſire to appear, *&c.*;" that is, any part of the lands of which the tenant was poſſeſſed. It is true, the rule under which the landlord is admitted is general, and if conſtrued literally would entitle the Plaintiff to recover more. That rule therefore muſt be narrowed by the act which was meant to benefit landlords, who before that time had no remedy if their tenants did not chooſe to defend. *Goodright* v. *Hart et ux.* 2 *Str.* 830.

Rooke J. The Plaintiff's right to recover in ejectment is founded entirely on the ſervice of the declaration upon the tenant in poſſeſſion: he muſt therefore ſhew poſſeſſion in the tenant to entitle himſelf to recover. Though the rule be general, he cannot demand premiſes of which the tenant is not poſſeſſed; for if the landlord could defend for a tenant not ſerved, he might thereby contrive to deprive him of his term.

Rule abſolute.

Nov. 25th.

Goodtitle on the ſeveral demiſes of Holford, Jervoise, and Cave, Bart. *v.* Otway.

A. ſeiſed in fee of the manors of *Stamford,&c.* and alſo of the manors of *Swinford* and *South Kilworth*, entered into marriage-articles to ſecure a jointure to his intended wife upon the above eſtates, and to make provision for younger children, and agreed to ſettle the *Stamford* eſtate upon his eldeſt ſon in ſtrict ſettlement, ſubject to part of ſuch jointure and proviſion; he then deviſed thoſe eſtates, in caſe he ſhould happen to die without iſſue, and ſubject to ſuch jointure as he might make, to the leſſors of the Plaintiff for five hundred years, upon certain truſts in the deviſe expreſſed; afterwards, by ſeparate deeds of leaſe and releaſe, he conveyed, 1ſt, the *Stamford* eſtate to truſtees in fee to the uſe of himſelf in fee till the marriage, with divers limitations, in purſuance of the articles, and ſubject to a term of five hundred years, for ſecuring part of his wife's jointure, remainder to himſelf in fee; 2dly, the *Swinford* and *South Kilworth* eſtate to truſtees in fee, to the uſe of himſelf in fee till the marriage, to the uſe and intent that his intended wife ſhould take the other part of her jointure thereout if ſhe ſurvived him, and after his death remainder to truſtees for five hundred years, to ſecure ſuch jointure, remainder to himſelf in fee; he afterwards married, and died without iſſue. Held that the will was revoked as to both eſtates by the deeds of ſettlement, though they were conſiſtent with the proviſions of the will, and though the deviſor took back the eſtate he parted with by the ſame inſtruments; and alſo held that the latter eſtate was not excepted from this revocation by the circumſtance of the conveyance of that eſtate to the truſtees, being merely for the purpoſe of creating a term to ſecure the wife's jointure.

The facts of this caſe having twice appeared in print; 1ſt, in the report of the trial at bar, 2 *H. Bl.* 516. and 2dly, in the report of the caſe in error, 7 *Term Rep.* 399. they are here altogether omitted. There were two arguments in this court; one in *Trinity* Term 1795, by *Williams* Serjt. for the leſſor of the Plaintiff, and *Heywood* Serjt. for the Defendant; and another in *Eaſter* Term 1796, by *Le Blanc* Serjt. for the former, and *Adair* Serjt. for the latter; but as they were much commented upon in the following judgments, (each of which comes from the higheſt authority,) they are not inſerted in this report.

The Court took time to conſider of their opinions; and on this day delivered them *ſeriatim*, there being a difference upon the bench.

Rooke J. On this verdict it appears, that Sir *T. Cave* made his will and deviſed all the premiſes contained in the declaration to truſtees in fee upon certain truſts and uſes; that he afterwards, by two deeds of leaſe and releaſe, conveyed the ſame premiſes to truſtees in fee upon certain other truſts and uſes, with remainder to the uſe of himſelf in fee, and that he died without republiſhing his will.

The queſtion is, whether by both or either of theſe deeds the deviſe of the premiſes contained in either of the counts in the declaration is rendered ineffectual; or, according to the common language of our books, is revoked?

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To decide this queſtion, it is neceſſary to conſider the general nature and effect of a will of lands. A will of lands is a conveyance authoriſed by the *ſtat.* 32 *H.* 8. *c.* 1. It is not to be conſidered as a declaration of uſes, or as conveying uſes which are executed by the *ſtat.* 27 *H.* 8. *c.* 10. It is a conveyance of the land itſelf; or, in the words of Lord *Trevor Fitzg.* 239. it is a proviſion and direction by the teſtator how his *eſtate and land* ſhall go when he can keep them no longer. This is plain from the words of 32 *H.* 8. *c.* 1. *ſ.* 1. "Every perſon having lands, *&c.* may "give, diſpoſe, will, and deviſe, as well by laſt will and teſtament, "in writing or otherwiſe, by acts lawfully executed in his life, all "his ſaid lands, *&c.* at his free will and pleaſure." No intereſt paſſes till the death of the teſtator. When he dies the will conveys to the deviſee ſuch intereſt as the teſtator has deviſed to him out of that eſtate or legal intereſt of which the teſtator was ſeiſed when he executed the will; but under this reſtriction, that the teſtator has continued to be ſeiſed or poſſeſſed of it from the time of the executing the will to the hour of his death. To underſtand this operation of a will, we muſt bear in mind, that in contemplation of law there is a diſtinction between, firſt, the land itſelf; ſecondly, the legal fee-ſimple or poſſeſſory right of inheritance in the land; and thirdly, the uſe or equitable right of inheritance. A man may at this day make a conveyance of the fee-ſimple of his land, without parting with the actual poſſeſſion; and though the legal fee will paſs from him, yet it may be reveſted in him, under the ſtatute of uſes, together with his old uſe or right of inheritance. But though he is ſeiſed of his old uſes, ſtill if he has by any conveyance for one moment paſſed away the fee-ſimple of his land, the law conſiders him as having *another* ſeiſin, and not the *ſame* which he had before he made the conveyance.

If, therefore, a teſtator having executed his will, conveys away his whole fee-ſimple, though it be to his own uſe, and though he is ſeiſed again of his old uſe, yet, according to the rules of law, as I underſtand them, this conveyance renders the will ineffectual; not becauſe the teſtator intended to revoke it, but becauſe by the rules of law it cannot operate; for he has altered his legal ſeiſin. The rule is laid down by Lord *Trevor* thus, *Fitzg.* 240, "One "neceſſary qualification which goes to the power of diſpoſing by "will, is the ownerſhip of the land: the law requires that to be "complete at the time of making the will. Conſider, as to this "point, the law is very ſtrict that the teſtator ſhould have a diſ-"poſing power at the time of making the will; for it is ſo far from "allowing a ſubſequent power by acquiſition after to make the will "good, that it requires a *continuance of the ſame intereſt* the deviſor "had at the time of making the will, to remain *unaltered*, even to "the time of his death; for that any, even the leaſt alteration of "the intereſt, is an actual revocation of ſuch will." Lord *Hardwicke* expreſſes himſelf to the ſame effect, and almoſt in the ſame words, according to the report of *Sparrow* v. *Hardcaſtle*, 3 *Atk.* 803. Lord *Mansfield* lays down the rule in theſe words, 4 *Burrow* 1960: "When a man ſeiſed of an eſtate makes his will and "deviſes it, and afterwards conveys it *entirely* away; though he takes "it back by the ſame inſtrument, or by a declaration of uſes, it is "a revocation; becauſe, as it is ſaid in the books, he has parted with "his *whole eſtate*." In confirmation of this rule, we may obſerve, that the form of pleading a deviſe of lands is, that the teſtator was ſeiſed, &c. and being ſo ſeiſed he made his will, and thereby deviſed, &c. and of *ſuch his eſtate in the ſaid lands died ſeiſed.* The deviſe then operates upon *that ſeiſin* which the teſtator had at the time of making his will.

This rule of law is very ancient. The books refer us to a caſe in the 44 *Ed.* 3. which is reported both in the year book (*a*) and the book of aſſize (*b*). In aſſize the tenant pleads in bar a deviſe made by the father of the Plaintiff; the lands being deviſable by cuſtom. The Plaintiff entitles himſelf as heir, and ſays, that the father *after* the deviſe made a feoffment *to defeat the deviſe*, and took back the eſtate. The tenant rejoins, that he re-publiſhed the will by delivering it to the vicar; and iſſue was joined on the delivery. It is to be remembered, that at this time a parole revocation or republication was ſufficient. This will, therefore, might have been revoked without the ceremony of alienation and taking back: it might alſo have been re-publiſhed without a delivery to the vicar. It ſeems doubtful from *Fitzh. Abr. tit. Deviſe, pl.* 16. whether *Thorp* and *Wilby* thought that a feoffment and taking back would revoke; and alſo in *Bro. Abr. tit. Deviſe, pl.* 8. a quære is made as to the alienation and taking back; and it is ſaid, that it ought not to defeat the will made before; for it is no will till death. It appears from the year book and book of aſſize, that a doubt was entertained as to the propriety of the form of the iſſue; becauſe the heir does not deny that it is the laſt will, but denies that the teſtator delivered it to the vicar. Whatever doubts might be entertained of the authority of

(*a*) *Fol.* 33. (*b*) *Lib.* 44. *pl.* 36.

this caſe, if it ſtood alone, or long ſeries of authorities from very early time forbids us at this day to doubt the principle, which is ſuppoſed to be eſtabliſhed by it, *viz.* that a feoffment or alienation, and taking back, is a revocation of a prior will. *Dyer (fo.* 143. *P.* 3 & 4 *Ph. & M.)* cites the caſe 44 *Ed.* 3. and conſiders it as a ſettled point that the will is void, without a new agreement; becauſe the alienation was a diſagreement to it; and without other expreſs agreement it ſhall not be taken as his laſt will, for it was once revoked. That a man muſt have the lands at the time he deviſes them, has been long ſettled; it was ſo agreed in *Butler* and *Baker*'s caſe, *M.* 33 & 34 *Eliz.* 3 *Co.* 30. *b.*; and was the common law of the land, as to cuſtomary deviſes, before the ſtatute 32 *H.* 8. Lord *Mansfield* aſſigns this reaſon for it: That a will is in the nature of a revocable appointment or limitation of the land, *mortis cauſâ*; and is not, like the Roman teſtament, a conſtitution of an heir. 3 *Burr.* 1497.

But the queſtion in the preſent caſe is, as to the change of intereſt, though the teſtator dies ſeiſed of the ſame uſes which he had at the time he made his will. The caſes are ſtrong to ſhew that this is a revocation. In 1 *Roll. Abr.* 615. *Q. pl.* 1. is this caſe: "If a man "deviſes lands to *J. S.* and after makes a feoffment in fee thereof "to a ſtranger to the uſe of himſelf in fee, though he has his old "eſtate, yet it ſeems this is a revocation; for his intent was to have "it by the new limitation, and by the *feoffment he paſſed the eſtate*, "and the ſtatute reveſted it in him, which is as a new purchaſe (*a*)."

Lord *Trevor* cites this caſe as good law, *Fitzg.* 241. Lord *Hardwicke* conſiders the point as ſettled; and he ſo ſtates it in *Parſons* v. *Freeman*, 3 *Atk.* 740. and obſerves, that it is a prodigious ſtrong caſe. So when a man deviſes lands to *J. S.* in fee, and after makes a feoffment thereof to another to the uſe of himſelf for life, remainder to his wife for life, remainder to his own right heirs: though here he hath his old reverſion, yet it ſeems it was his intent to have it paſs by the livery and to be in by the ſtatute and the limitation, and ſo as a new purchaſe, 1 *Roll, Abr.* 616. *Q. pl.* 2. This laſt point is ſtated by *Roll* to have been ſettled in the caſe of *Montague* v. *Jefferies*; but according to the ſtatement of that caſe in *Popham* 108. this was not the direct point in queſtion before the Court; but, however, it is adopted by Lord Chief Juſtice *Roll* as good law. It is alſo cited by *Yelverton*, *arguendo Cro. Car.* 24. and

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(*a*) But the book adds; *Contrà M.* 38 & 39 *Eliz. B. R. per Popham.*

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and not denied by the Court. *Huſſey*'s caſe, 2 *Jac.* 1. *Scac. Moor*, 789. is ſtill ſtronger: it proceeds upon the ſame principle. *H.* a baſtard having purchaſed a manor of the Queen, made a will and deviſed the manor: he then made a feoffment to the uſe of ſuch perſons and for ſuch eſtates he had as declared by his will bearing date, &c. It was adjudged that the feoffment was a countermand of the will, but that the countermanded will was ſufficient to declare the uſes of the feoffment, ſo no eſcheat. In ſome of theſe caſes the intent of the party has been mentioned. But we muſt remember to diſtinguiſh between an intent to have the land by a new limitation, or as a new purchaſe and an intent to revoke the will, 1 *Roll, Abr.* 615. There is a ſort of revocation which does not depend on the intent of the teſtator; as where a man only takes back the very eſtate which he had deviſed by a new conveyance; *per Murray* Solicitor General, *arguendo Parſons* v. *Freeman*, 3 *Atk.* 745. *b.* If it is clear that the party took the land by a new purchaſe, the conſequence of law is, that the will is annulled without any regard to the queſtion, whether the party intended to revoke it or not? There are other caſes of revocation ſtated in the books prior to the ſtat. 29 *Car.* 2. *c.* 3.: thus where a man has intended to revoke his will, but has made uſe of a mode of conveyance which was not completed: as where *A.* having deviſed a reverſion to *B.* granted the ſame by deed to *C.*, this has been held a revocation, though the leſſee never attorns; ſo where having deviſed lands to *B.* he bargains and ſells to *C.*, and acknowledges it before a doctor to be inrolled within ſix months, though it be not inrolled within the time, this has been held to be a revocation; for he hath fully ſhewn his intent that the deviſee ſhould not have it, 1 *Roll. Abr.* 615.

But the revocation applicable to the preſent caſe is, that, where the teſtator alters his legal intereſt in the land, without any intent to revoke his will. In ſuch a caſe, I underſtand the rule of law to be, that if he conveys for years or for life, it is only a revocation *pro tanto*; but if he convey the whole fee, it entirely annuls the effect of the will, unleſs he republiſhes. This rule ſeems eſtabliſhed by the caſes I have already cited, and by the inferences drawn from them by Lord *Trevor*, Lord *Hardwicke*, and Lord *Mansfield*. And to theſe authorities may be added a ſeries of caſes from the time of Lord Chief Juſtice *Roll* to this day; all of which appear to have been decided upon this principle. Of theſe, *Diſter* v. *Diſter*, *P.* 35 *Car.* 2. 3 *Lev.* 108. was a caſe of ejectment, and ſpecial verdict found. Tenant in tail made his will and deviſed his land; and after, by bargain and ſale inrolled, conveyed away the land to make a tenant to the *præcipe*, againſt whom a common recovery was had, with voucher of tenant in tail to the uſe of himſelf in fee. Whether by this recovery the will was made good, ſo that by virtue thereof the deviſee ſhould have the land, or whether the deviſe was revoked by the recovery, was the queſtion: And by *Pemberton* Ch. J. and the whole Court, it was adjudged, upon argument, that this was a revocation; for, by the bargain and ſale and recovery, *the whole* eſtate was *changed and altered* after making the will; yet here is no change of the uſe; for if he inherited the intail *ex parte maternâ*, the eſtates ſhall deſcend to his heirs *ex parte maternâ*; ſee the caſe of *Martin ex dem. Tregonwell* v. *Strachan and others*, reported correctly 5 *Term Rep.* 107. in the note. The caſes of Lord *Lincoln* (*a*), *Parſons* v. *Freeman* (*b*), and *Sparrow* v. *Hardcaſtle* (*c*), are well known, and need not to be ſtated at large. Theſe in my judgment confirm the rule of law. And in *Sparrow* v. *Hardcaſtle*, 3 *Atk.* 806. Lord *Hardwicke* obſerves, that there having been an uniform ſeries of opinions on this point, it ought not to be varied. In *Brydges* v. *Ducheſs of Chandos*, the learning as to this rule is very ably and elaborately diſcuſſed, and the point is confirmed by Lord *Loughborough*: his Lordſhip aſſerts as his own opinion, and ſtates from a more correct note of *Parſons* v. *Freeman* than is given in *Atkyns*, that it was the opinion of Lord *Hardwicke*, that where the whole fee is conveyed, it is a revocation of the whole deviſe; where part only is conveyed, it is a revocation *pro tanto*.

To this rule there are ſome exceptions; but theſe exceptions admit and prove the general rule. The firſt exception is as to partition. This does not reſpect joint-tenants; for, if joint-tenant deviſes and makes partition afterwards, it does not help the deviſe, which was void in its creation. *Swift ex dem. Neal* v. *Roberts*, 3 *Burrow*, 1488. But parceners and tenants in common being ſeiſed only of their reſpective portions in an undivided whole, would by writ of partition retain their ſeiſin in the portion allotted them. Now, if inſtead of dividing by writ of partition, which they may be compelled to do, they proceed to divide by deed

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(*a*) *Eq. Caſ. Abr.* 411. *Show. Parl. Caſ.* 154. S. C. 2 *Freem.* 293. S. C.

(*b*) 3 *Atk.* 741. *Ambl.* 115. S. C. 1 *Wilſ.* 308. S. C. 2 *Veſ jun.* 4. cited *per L. Loughborough.*

(*c*) 3 *Atk.* 798. *Ambl.* 224. S. C. 7 *T. R.* 416. note, S. C.

(*d*) 2 *Veſ. jun.* 433.

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and fine; the law has ſo far indulged them, as to declare that ſuch partition ſhall not revoke a prior deviſe, *Luther* v. *Kidby* (*a*), certified by *Raymond* Ch. J., *Page*, *Probyn*, and *Lee*, Js., on a reference from Lord Chancellor *King*, 9th *April*, 1730, 3 *P. Wms.* 169. note [B]. But the courts of law are rigid even in this indulgence; for in the caſe of *Tickner* v. *Tickner* (*b*), where parceners in gavelkind made partition by deed and levied a fine, and one of them declared the uſe to himſelf, and ſuch perſon as he ſhould appoint by deed or writing; and in default of ſuch appointment, to himſelf in fee; Lord Ch. J. *Lee* held it a revocation; and this caſe is adopted by Lord *Hardwicke*, *Parſons* v. *Freeman*, 3 *Atk.* 750. There are other exceptions; as the caſe of a mortgage, and of a conveyance to pay debts. Theſe, however, are revocations at law, though not in equity.

Notwithſtanding theſe exceptions, I take it as a general rule of law, that where a teſtator conveys his whole intereſt by feoffment, leaſe and releaſe, bargain and ſale, or by fine and recovery, (it makes no difference which, ſee 3 *Atk.* 749.) it renders his will ineffectual at law. It is often very contrary to the intent of a teſtator that his will ſhould be annulled by ſuch a conveyance; and it often bears hard upon individuals that the rule of law ſhould be ſtrictly adhered to. But while it is a rule, judges are bound to adhere to it; and if it produces more miſchief than good, the legiſlature in its wiſdom may alter it. In vindication of the rule, however, we may obſerve; firſt, it is in favour of the heir-at-law, who is always an object of judicial favour; and it reſults neceſſarily from the technical operation of a legal conveyance. A will is a conveyance to the prejudice of the heir-at-law. If the law took its ordinary courſe, he would inherit the ſeiſin of his anceſtor. If the anceſtor being ſeiſed, makes his will, and afterwards changes his ſeiſin, it follows by technical conſequence that the old ſeiſin is at an end, and that the new ſeiſin deſcends to the heir, without being affected by the prior will. Secondly, it is ancient, and as much a part of our legal ſyſtem, as to landed property, as the rules which exclude the father from the inheritance of his ſon, and the half-blood from inheriting at all. Thirdly, it cannot operate upon one who is *inops conſilii*, or who has no opportunity of being adviſed; for, if a man is ſufficiently ſtrong in mind and body, and well enough aſſiſted to execute a ſolemn deed which paſſes away his legal

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(*a*) 1 *Vin. Ab. tit.* Deviſe, (*R.* 6.) *pl.* 30.

(*b*) *Cit.* 3 *Atk.* 742.

fee-ſimple, he ſurely may, if he will pay attention to it, republiſh his will. Fourthly, it is a plain, ſimple, and perfectly intelligible rule, and amounts to no more than this, that after a man has made his will, if he execute a conveyance of the legal fee-ſimple of the lands he has deviſed, he muſt republiſh his will, or it cannot take effect. If, with ſo plain a rule to direct them, the parties omit to republiſh, the diſappointment of the deviſees is ſurely not to be imputed ſo much to the rigour of the rule, as to the neglect of the parties, who either take no advice, or apply to ſuch perſons only as are unable to adviſe them properly.

Having thus ſtated the law as to this head, let us now ſee what is the caſe before the Court. I will firſt conſider the two laſt counts which apply to the *Swinford* and *South-Kilworth* eſtates. The teſtator being ſeiſed in fee, conveys by leaſe and releaſe to truſtees in fee, to the uſe of himſelf till marriage; then to ſuffer Lady *Lucy* to receive 1400*l.* a-year; then he creates a term of five hundred years for better ſecuring her jointure, then to the uſe of himſelf in fee. I lay the articles out of the caſe, for they are to be performed after marriage, and this is a voluntary conveyance before marriage; beſides, if this were merely a performance of articles, it might be a caſe rather for a Court of Equity than for a Court of Law. I conſider this as a conveyance to truſtees in fee, for the ſpecial purpoſe of ſecuring a jointure to his wife; had he conveyed to truſtees during the life of the wife only, I ſhould have thought it, according to the caſes already decided, to have been a revocation *pro tanto* only; but having conveyed to the truſtees in fee, I think I am bound, by the uniform ſeries of authorities, to hold that the will cannot operate, or (in the language of our law), that it is revoked as to theſe eſtates. If I am right in this, the rule may be applied with equal, if not with greater force, againſt the claim of the deviſees as to the *Stanford* eſtate.

I am therefore of opinion that judgment ſhould be given for the heir-at-law (the Defendant) on all the counts.

HEATH J. (after ſtating the caſe.) We are all agreed, that the ſettlement of the *Stanford* eſtate which paſſed by leaſe and releaſe, dated the 25th and 26th of *March* 1791, operated as a revocation of the deviſe of the ſame. We are divided in opinion concerning the operation and effect of the ſettlement of the *Swinford* and *South-Kilworth* eſtates, whether or no it had the ſame effect on the deviſe of thoſe eſtates? The rule of law which is to govern us muſt be extracted from the ſeries of authorities to be found in the books on this point, and for that purpoſe it would be material to take an hiſtorical review of the principal caſes, if it had not been done by my brother *Rooke;* I ſhall only allude to them. Before the ſtatute of wills, where lands were deviſable by cuſtom, if a man ſeiſed of lands in fee, deviſed the ſame, and then made a feoffment in fee, and afterwards retook a fee in the ſame lands, it was holden to be a revocation, *Brook*, tit. *Deviſe*, *pl.* 8. So if a man deviſe the uſe of lands whereof he had made feoffment, and took back the fee, it amounted to a revocation.

After the ſtatute of wills when a teſtator, after making his will, parted with the whole fee, though part of the old uſe was expreſsly reſerved to himſelf, or reſulted by operation of law, it was ſtill a revocation, becauſe all re-veſting by the ſtatute of uſes operates as a new feoffment, 1 *Roll. Abr.* 615. at the bottom, and the party elected to take by a new limitation; ſo that he was in of a new eſtate. The revocation was effected by law, and ſometimes againſt the intent of the teſtator, 1 *Roll. Abr.* 614, 615. In order to ſhew that any change of the teſtator's eſtate will operate as a revocation of his will, as well after the ſtatute of uſes as before, it will be ſufficient to allude to the ſeveral caſes of *Montague* and *Jefferies*, Earl of *Lincoln*'s caſe, *Parſons* v. *Freeman*, *Sparrow* and *Hardcaſtle*, *Darley* and *Darley* (*a*), and *Brydges* v. *Ducheſs of Chandos*; ſome of theſe caſes were decided in Courts of Law, others of them in Courts of Equity. It is on the authority of theſe caſes that we are of opinion, that the ſettlement of the *Stanford* eſtate is *pro tanto* a revocation of the deviſe of the ſame. It remains to be diſcuſſed, whether the ſettlement of the *Stanford* eſtate eſſentially differs from that of the *Swinford* and *South-Kilworth* eſtates, ſo as to receive a different conſtruction? It is material to obſerve, that in both ſettlements the whole legal fee is veſted in truſtees to the uſe of the ſettlor until the marriage. The ſubſequent limitations are mere ſpringing uſes to ariſe out of the legal eſtate of the truſtees from and after the marriage. In this mode of conſidering the ſubject, this is preciſely the ſame caſe as thoſe of *Montague* and *Jefferies*, and of the Earl of *Lincoln*. The circumſtance of the marriage having taken effect is totally immaterial. The revocation was complete on the execution of the deeds of ſettlement in the caſes laſt cited, as well as in the preſent caſe. It is ſcarce material to obſerve, that in both of them there are ſeveral limitations made in purſuance of the articles, with an expreſs remainder in fee to the ſettlor.

(*a*) 3 *Wilſ.* 6.

There are two caſes which remain to be diſcuſſed, and which I find difficult to reconcile with each other, namely, *Luther* v. *Kidby*, and *Tickner* v. *Tickner;* both caſes of partition.

In the caſe of *Luther* v. *Kidby*, it was held, that a partition by fine and deed, leading the uſes of the fine, did not operate as a revocation of an antecedent deviſe of the ſame lands, though the the whole fee paſſed. We are left to conjecture the ground of deciſion. It might influence the opinion of the judges, that a partition is compulſory and not voluntary. To refuſe to make partition is ſtated in the writ as an injuſtice. It had been held that a partition by a writ did not operate as a revocation of an antecedent will, becauſe the land is not in demand, but the writ is merely brought to affirm the poſſeſſion, as it is expreſſed in *Dyer* 79. *b.* or to aſcertain the poſſeſſion as it is expreſſed by Lord *Hale* in his commentary on that paſſage, in his note on the writ *de Partitione faciendâ*, in *Fitzherbert's Natura Brevium* (*a*), and the legal eſtate of the parties is not revoked by the judgment. It might have been the opinion of the judges that a partition by deed ought not to have a greater effect than a partition by writ, and that no act of the teſtator that was not merely voluntary, ought to operate as an implied revocation of his will. Howevcr that may be, I find it difficult to reconcile it with the caſe of *Tickner* v. *Tickner*, which only differs from it in reſerving a power of appointment. Though the execution of the power would operate as a revocation of a will, yet I doubt very much whether the mere revocation could have that effect. A power unexecuted ſeems to be the ſame as no power at all. It is material to conſider, whether this reſervation makes any real difference. In the caſe of *Montague* and *Jefferies*, it was ruled, that covenant to make a feoffment was no revocation of a writ though the feoffment itſelf was ſo. The caſe of the covenant is much ſtronger than that of the power; for the covenant declared the intention of the teſtator to do an act inconſiſtent with the antecedent deviſe: but the power was ſimply a reſervation by the grantor of part of his antient dominion over his property; the execution of it is merely optional, and it has no effect until it is executed. We are relieved from conſidering the effect of ſuch deeds which paſs the fee-ſimple, and yet are made for partial and particular purpoſes, becauſe it is a conſideration which belongs to a Court of Equity, and of which we can take no conuſance. Though in many inſtances

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(*a*) Page 61.

the Courts of Law take notice of the uſe, yet they never do it in deciding on the power of deviſing or revoking a deviſe. Thus, for inſtance, if a teſtator ſeiſed in fee of lands deſcended to him *ex parte maternâ*, after deviſing the ſame, make a feoffment thereof to his own uſe, it operates as a revocation of his will according to the authorities before cited, nevertheleſs at the death of the teſtator the lands deſcend to his heir *ex parte maternâ*, *Co. Lit.* 13. *a.* The reaſon is this, that before the ſtatute of uſes the heir *ex parte maternâ* of the feoffor in the caſe put, was intitled to the *ſubpœna* againſt the feoffee; afterwards when the ſtatute of uſes was enacted, which executed the poſſeſſion to the uſe, the legal eſtate had the ſame deſcendible quality as the uſe, ſo that the judges muſt of neceſſity take notice of the uſe. The ſtatute of wills attaches on the legal eſtate without reference to the uſe, and when the legal eſtate is altered, the deviſe is revoked. For theſe reaſons, I am of opinion, that there exiſts no eſſential difference between the limitations in the ſettlements of theſe two eſtates, and I think myſelf bound by a ſeries of deciſions, with the ſingle exception of the caſe of *Luther* v. *Kidby*, if that will not admit of the explanation which I have attempted to give it, to declare, that the teſtator, by changing the legal eſtate of the lands in queſtion, though the old uſe had remained untouched, has thereby revoked his will.

Buller J. The principal ground of argument relied on by the Counſel for the Plaintiff was, that the articles, will, and deed, are all to be taken as one tranſaction, and therefore, upon the authority of *Selwin* v. *Selwin*, 2 *Burr.* 1131. the deed was not a revocation of the will.

But when the preſent caſe, and the caſe of *Selwin* v. *Selwin* are conſidered, I think they will appear to be as different as any two caſes which can be cited.

In the caſe of *Selwin* v. *Selwin*, the deed to make the tenant to the præcipe was the moſt eſſential part of the recovery, and therefore the recovery when ſuffered related back to that deed, which was executed long before the date of the will. Beſides we are told by Sir *James Burrow*, (who certainly had the higheſt aſſiſtance in ſtating what he calls the probable grounds of the judgment), that one reaſon was, that the teſtator took a uſe under the deed of bargain and ſale, which uſe was deviſable, and therefore the point of that caſe was no more than that a will, made by a perſon having a legal eſtate, was not revoked by a confirmation of that eſtate made by a conveyance partly executed before the will, and partly executed and completed after the will.

In this caſe the articles formed no part of the deed. The parties, if they pleaſed, might have made very different proviſions in the deed from thoſe contained in the articles, and if done before marriage, neither law or equity could have altered the deed. Though, in the preſent caſe, the deed was made in purſuance of the articles, yet it could not relate back to the date of the articles, or give the legal eſtate from that time; which was the caſe in *Selwin v. Selwin*; for when the recovery was completed, the teſtator was conſidered as having the legal eſtate from the date of the bargain and ſale.

The will in the preſent caſe has neither an expreſs or neceſſary reference to the articles, or to the ſettlement. It does not profeſs to carry the articles into execution, but is made with a more general view to the ſituation and circumſtances of the teſtator and his relations. By the articles Sir *Thomas Cave* agreed only to ſettle the eſtate on his eldeſt ſon, and his heirs male in ſtrict ſettlement: but by the ſettlement the eſtate is limited to the firſt and other ſons of that marriage only; which, I preſume, was the ſubſequent agreement and intention of the parties. The will is made *diverſo intuitû*, and is not to take effect, if Sir *T. Cave* had any iſſue either male or female by Lady *Lucy* or any other wife. Again, the will is ſubject to any jointure which he might make at any period of his life, and is not confined to that jointure which he had agreed to ſettle on Lady *Lucy*.

If I were at liberty to form a conjecture from what appeared at the trial and from the ill ſtate of health in which Sir *Thomas Cave* was deſcribed to be, I ſhould conclude that his intention was, that his will ſhould only take effect if he died before he married. But the words of the will and the ſpecial verdict do not admit of that conſtruction, and therefore I lay that out of the queſtion.

I alſo lay wholly out of the queſtion what might have been the effect, if the articles had been recited in the will, or the will had been in any other form from what we find it on this record; for, it is upon that we are to pronounce. Whether a mere recital of an agreement, or what words would ſuffice to make a contingent deviſe to confirm that agreement, or to make other deviſes depending on that agreement, are points which do not ariſe here, and if they did, a modern authority, which I ſhall mention hereafter, would decide them.

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We are now to pronounce our opinions on different inſtruments conveying a legal eſtate. The articles did not convey any legal intereſt, and they are not noticed in the will; and therefore I think now, as I thought at the trial, that they ought not to have formed a part of the verdict, and we ought not to take any notice of them. If they are incorrect, we cannot correct them. If there be any miſtake in them or in the deed, we cannot ſet it right, but are bound to pronounce on the effect of the deed, as it ſtands on this record.

This brings the caſe ſimply to the queſtion, whether the deed make ſuch an alteration in the eſtate, which Sir *T. Cave* had at the time of making his will, as to be a revocation of that will?

All the eſtates were conveyed to the uſe of truſtees in fee, and therefore I can make no difference between the different parts of the property. Conſidering the caſe in this light, the point of revocation is ſo fully eſtabliſhed by ancient and modern authorities, that to doubt about it at this time of day would be ſhaking rules of property.

The caſes on this head are ſo numerous, that I ſhall only mention ſome of them, and thoſe I will ſtate very ſhortly. In 1 *Roll. Abr.* 616. is this caſe: If a man deviſe lands to *T. S.* in fee, and afterwards makes a feoffment of it to another *to the uſe* of himſelf for life, remainder to his wife for life, remainder to his own right heirs in fee, though he hath *his old reverſion*, yet it ſeems that his intent was to have it paſs by the livery, to be in by the ſtatute and limitation, and ſo as a new purchaſe; and therefore it ſeems, that this ſhall be a revocation of the fee, as well as for the life of the wife. *Godbold* v. *Freeſtone*, 3 *Lev.* 406. was a feoffment to the uſe of the feoffor for life, to the uſe of his wife for life, to the heirs of his body on his wife begotten, remainder to his own right heirs; and it was held, that the old uſe and eſtate ſhould go to the heirs *ex parte maternâ; for the old uſe was never drawn out* of the feoffor. So in *Abbot* v. *Burton*, 2 *Salk.* 590. where the party ſeiſed in fee levied a fine, and ſuffered a recovery with limitations in fee to his own right heirs; it was held, that the heirs *ex parte maternâ* took, and that there was no difference between an expreſs limitation and a uſe reſulting by law.

There was no queſtion in either of thoſe caſes about a revocation of the will; and the authority of *Roll's Abridgment* is left untouched. Under that authority, there is no doubt but a previous will in either of the two laſt caſes would have been revoked by the feoffment, or fine and recovery; and ſo the law has been conſidered ever ſince.

The caſe in *Roll's Abridgment* goes beyond *Abbot* v. *Burton*, becauſe, in the latter caſe the uſe was out of the party and veſted in truſtees, but in the former caſe the uſe never was conveyed to any other perſon, and it was holden to be a revocation.

In Lord *Lincoln*'s caſe the limitation in the deed was to the uſe of himſelf and his heirs till the marriage, which marriage never took effect, nor was ever propoſed, and yet it was holden that a prior will was revoked by that deed. In *Doe* v. *Pott*, *Doug.* 722. Lord *Mansfield* ſaid, the abſurdity of Lord *Lincoln*'s caſe was ſhocking, but that it was law. Perhaps the misfortune in that caſe was, that the deed was not attacked on the ground of inſanity. Lord *Trevor* in *Fitzg.* 241. puts the caſe thus: "If tenant in fee deviſe, and afterwards make a feoffment to the uſe of himſelf and his heirs; though this to ſome purpoſe is no alteration, (for he is abſolute owner as before,) yet it is a revocation;" which plainly ſhews, that he thought the caſe turned on the firſt limitation only, without regard to the limitations on the marriage, which never took effect. It has been quoted in the ſame manner by other judges. *Parſons* v. *Freeman*, *Ambl.* 116. *Sparrow* v. *Hardcaſtle*, *Ambl.* 224.

In 3 *P. Wms.* 165. "Where a man having lands, deviſes them, and afterwards makes a feoffment of them, though to the uſe of himſelf and his heirs, and though this uſe be the old uſe and the old eſtate, yet according to the ſeveral caſes in *Roll's Abridgment*, 614. *tit. Deviſes revoked*, this is a revocation; and *Diſter* v. *Diſter*, 3 *Lev.* 108. was cited as in the very point; of which opinion was alſo the Lord Chancellor." But in the principal caſe the deviſor was tenant in tail male, remainder to himſelf in fee. To the ſame effect is *Darley* v. *Darley*, 3 *Wilſ.* 13.

In the caſe of the Ducheſs of *Chandos* and Lady *Anna Eliza Brydges*, the facts were, that the Duke of *Chandos* on the 20th of *June* 1777, by articles previous to his marriage, covenanted to convey lands in ſuch manner, that he ſhould be ſeiſed in fee, and his wife entitled to dower if ſhe ſurvived him; and that he would convey all thoſe lands to the uſe of himſelf for life, to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of the marriage in tail male, *remainder to his own right heirs.* The marriage took effect; and on the 29th *January* 1780 the Duke by his will confirmed the articles, and deviſed all his real eſtate to his wife for life, with remainder to ſuch perſon as ſhe ſhould by will appoint; and in default of appointment, with remainders over. Afterwards, by leaſe and releaſe, dated 29th and 30th *October* 1780, *reciting the marriage and articles*, the Duke conveyed all his real eſtates to truſtees and their heirs, to the uſe of himſelf for life, remainder to truſtees to preſerve contingent remainders, remainder to other truſtees for a term to raiſe 2000*l.* *per* annum for the Ducheſs for her jointure, and in bar of dower, remainder to the firſt and other ſons of the marriage in tail male, remainder to the Duke and his heirs. It was determined both in the Court of Chancery and in the Houſe of Lords, (where all the Law Lords attended,) that the will was revoked by the ſettlement of the 29th and 30th of *October*. That was a deciſion in equity; and if the will were revoked in equity *a fortiori*, it was ſo in law.

As to the caſe of partition, that is *ſui generis*, and therefore if no ſatisfactory diſtinction could be made between that caſe and others, yet I ſhould not hold myſelf at liberty upon that ground to overturn all the deciſions which are to be found, and which are uniform upon this ſubject. But the caſe of partitions is materially diſtinguiſhable, and the determinations are founded wholly on that diſtinction. One tenant in common has a right *to his part* of the eſtate only, though he occupies the whole in common with others. He can ſell, deviſe, or give that part only; and by law any one of the tenants in common has a right to have his part ſet out by metes and bounds if he pleaſes, inſtead of occupying in common. When his proportion is ſo ſet out, he has the ſame eſtate and the ſame intereſt which he had before, and the partition only affects the mode of occupying that eſtate. The ground of the deciſion in *Webb* v. *Temple*, *Freem.* 524. was, that there was no material alteration in the eſtate; and notwithſtanding that, one Judge held that a partition and a fine to corroborate it was a revocation; but the partition there was not by the fine, but previous to it. If a partition by writ againſt the will of the teſtator was no revocation, it was but one ſtep more to hold, that the ſame thing done by deed or fine ſhould have a different effect. Whether that ſtep were right or not may be a different queſtion. In the caſe of *Luther* v. *Kidby*, in *Vin. Abr.* and 3 *P. Wms.* the deed, as ſtated, was merely a covenant to levy a fine; no intereſt paſſed by the deed to the truſtees; and if the partition were made wholly by the fine, the authority of that caſe may be queſtionable, for reaſons which I will ſtate hereafter. But putting that caſe in its ſtrongeſt light, and ſuppoſing it to be law, it goes no farther than to ſay that there is no difference

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between a writ of covenant to make partition, and a fine levied thereon, and a writ of partition. That tranſaction was ſolely for the purpoſe of making partition, and not a word is ſtated to ſhew that the Court meant to lay down any rule which could be applicable to any other caſe. On the contrary, it is there ſtated as law, "that if *A.* deviſes land, and levies a fine, and the caption and deed of uſes are before the will, but the writ of covenant is returnable after the will, that is a revocation of the will." Perhaps the caſe there put would not be ſo decided ſince the caſe of *Selwin* v. *Selwin*, but taking the whole of the caſe of *Luther* v. *Kidby* together, it ſeems as if the Court thought there was a difference between a fine for a partition, and a fine in any other caſe. If the fine were the operative inſtrument in *Luther* v. *Kidby*, the authority of that caſe ſeems to be conſiderably ſhaken by *Tickner* v. *Tickner*, and by what Lord *Hardwicke* ſaid in *Parſons* v. *Freeman*, and *Sparrow* v. *Hardcaſtle*. In *Tickner* v. *Tickner*, the fee and the old uſe veſted in the teſtator, and yet becauſe the partition was made by means of a conveyance to a truſtee, it was holden to be a revocation. I ſay the fee veſted in the teſtator, becauſe that is eſtabliſhed in different caſes. In *Doe ex dem. Willis* v. *Martin*, 4 *Term Rep.* 39. by a marriage ſettlement lands were conveyed to truſtees to the uſe of the wife for life, remainder to the uſe of the huſband for life, remainder to the uſe of all and every the children of the marriage, or ſuch of them, and for ſuch eſtates as the huſband and wife ſhould appoint, and for want of ſuch appointment, to the uſe of all and every the child and children equally, if more than one as tenants in common, and if but one, then to ſuch only child his or her heirs and aſſigns remainder over; the remainder to the children was held to be a veſted remainder in fee, liable to be diveſted by an appointment of the parents. Lord *Kenyon* there ſays, "the eſtate was there limited to *Bethia Willis* and to her heirs until the marriage, it was therefore intended that the legal eſtate ſhould not be taken out of her unleſs the marriage took effect." If the legal eſtate was not taken out of her till the marriage, neither was it taken out of Lord *Lincoln* by his deed, and yet that deed was holden to be a revocation. But the doctrine of the fee being veſted, was ſettled before by Lord Chief Juſtice *Holt*, in *Idle* v. *Cook*, 2 *Ld. Raym.* 1150. and by Lord *Hardwicke* in *Cunningham* v. *Moody*, 1 *Veſ.* 174. Now, if we apply theſe authorities to the caſe of *Tickner* v. *Tickner*, it is clear that the limitation in fee veſted in the teſtator, notwithſtanding the previous powers of appointment, and if it did, the deed and fine, and not the limitation of any new uſe, were the ſole grounds of revocation in that caſe. Thus it ſeems to be a direct contradiction of the caſe of *Luther* v. *Kidby*; and that it was conſidered at the time as an impeachment of the doctrine contained in *Luther* v. *Kidby*, appears clear from *Ambl.* 117. becauſe Sir *Tho. Raym.* 240. is there referred to as *contra*; and the ſame thing is ſaid in Sir *Tho. Raym.* as in *Luther* v. *Kidby*, though not determined. In *Parſons* v. *Freemam*, Lord *Hardwicke* approved of *Tickner*'s caſe, and ſaid it was the ſame as the caſe before him: and if there be no diſtinction between partition and other caſes, where the partition is made by deed and fine, *Luther* v. *Kidby*, ſuppoſing the eſtate there to have paſſed by the fine, muſt fall. What were the reaſons of the deciſion in that caſe we are not informed, and whether at this day it be or be not law, I think it cannot govern our preſent deciſion. If it be law, it is becauſe partition is a ſingle and excepted caſe, and it is no matter in what way it is effected: but it muſt be remembered, that in *Sparrow* v. *Hardcaſtle*, Lord *Hardwicke* expreſsly denies any diſtinction on account of a particular purpoſe.

In the caſe of a partition, where no eſtate moves out of the party, I agree there is no revocation, but if the partition be made by fine or deed, and the eſtate be conveyed to a truſtee, though for an inſtant only, and though the old uſe remains, I think that the later caſes eſtabliſh that to be a revocation. *Tickner* v. *Tickner* was decided by Lord Ch. J. *Lee*, who was one of the Judges who concurred in *Luther* v. *Kidby*, and ſeems to be a reviſion and correction of his former opinion, made probably after conferences with Lord *Hardwicke*, who on all occaſions approved of the laſt judgment. That deciſion ſupports all the other authorities in favour of the revocation, and plainly ſhews, that the caſes on a pure and ſimple partition proceed on a different ground, and are no impeachment of thoſe deciſions which hold that any alteration or conveyance of the eſtate by deed ſubſequent to the will, is a revocation of that will. The reaſon of which is, that when a man makes a conveyance, he not only actually transfers the eſtate he has, but he means that the eſtate ſhould paſs under that deed, and not under any other former deed or will.

Upon the whole, I am of opinion, that there ought to be Judgment for the Defendant.

EYRE Ch. J. (after ſtating the caſe.) Though the doctrine of revocation has been carried to a very inconvenient extent, in conſequence of which many wills have been cruelly diſappointed, and many families greatly diſtreſſed; I agree, that Judges are not to be wiſer than the law, and that it is their duty to declare and to execute the law as it is, and to ſtrain nothing, in order to mould it to their conceptions of what it ought to be. I therefore declare in the outſet, that I diſtinctly acknowledge every principle which governs the law of revocation, and that I ſubmit to the authority of all the numerous caſes that are to be found in the books upon this ſubject in the points to which the caſes go. But where the caſes are urged as illuſtrations of thoſe principles, and as furniſhing rules for the application of thoſe principles to the particular caſe now under conſideration, I conceive, that without incurring the imputation of removing land-marks, or breaking in upon rules of property, I may, and that I ought to inquire, whether the caſes are ſufficiently uniform, or approaching in point of circumſtance ſufficiently near, to controul my judgment in a caſe which appears to me to be new in circumſtance, and to depend upon a principle in the law of revocation which has never undergone much legal diſcuſſion.

To reduce the argument at once to the point in which I differ from all my Brothers, I think the caſe of the Earl of *Lincoln*, which having been very ſolemnly ſettled, ought not now to be open to any further diſcuſſion, and the late caſe on the will of the late Duke of *Chandos*, do approach ſufficiently near in point of circumſtance to this caſe, to be an authority for our deciding that the deeds of leaſe and releaſe firſt ſtated in this ſpecial verdict, do amount to a revocation *pro tanto* of the will. My doubt is, upon the effect of the ſecond conveyance by deeds of leaſe and releaſe ſtated in the ſpecial verdict. And I conceive, that, let the operation of this laſt-mentioned conveyance by leaſe and releaſe be what it may, Sir *Thomas Cave died ſeiſed of that eſtate which he had at the time when he made his will*, and that there is no ground to raiſe a preſumption in law from the conveyance, that Sir *Thomas Cave* intended to revoke his will, and therefore that his will may operate upon it. And that I may be clearly underſtood, I ſtate, that when I uſe the words "the ſame eſtate," I do not mean to deſcribe the identity of the land, but the quality of the eſtate and intereſt in that land. I mean to argue, that Sir *Thomas Cave* died ſeiſed of the old uſe to which the new *eſtate*, *right*, *title*, *and poſſeſſion*, in the words of the ſtat. of *H.* 8. that was for a moment in the truſtees under the conveyance by leaſe and releaſe, had united itſelf not as a new eſtate, title, right and poſſeſſion, but according

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to the quality, manner, form, and condition of the old uſe which was in Sir *Thomas Cave.* Here I take my ground. If I can be driven from it, I agree, that the will is revoked as to the whole. If I maintain it, it appears to me to follow, that upon the principles of the law of revocation, the will is not revoked, and that the authorities in our books will be better reconciled by a judgment, declaring, that the will is not revoked, than by a contrary declaration.

Wills are ſaid to be revoked firſt, in the proper ſenſe of the word "revoked," when the teſtator has ſignified his intention that the will which he has made ſhall not be his laſt will and teſtament, or when he has done certain acts, or certain alterations have taken place in his ſituation, ſo neceſſarily inferring an intention to revoke that the law will preſume ſuch an intention, and this is what we call an implied revocation.

Some of the inſtances of this laſt ſort of revocation are diſpoſitions of the teſtator's property ſubſequent to the date of his will, inconſiſtent with the will, ſuch as the giving a greater or a leſſer intereſt by a ſubſequent deed to the ſame perſon to whom he had deviſed ſome intereſt by his will. In ſuch a caſe the intended deviſee cannot have both intereſts: that which is conveyed by the deed muſt take effect, and therefore the law makes a neceſſary implication, that the firſt diſpoſition, which is by the will, is revoked. So if the teſtator make a feoffment upon which no livery is afterwards had, or execute a bargain and ſale which is never inrolled; though theſe work no alteration in the eſtate of the teſtator, the law will imply from them a revocation of the will, becauſe the going ſo far towards an alteration of his eſtate, manifeſts in the judgment of the law, his intention that the diſpoſition he had made by his will ſhould not ſtand. Marriage, and the birth of a child, is an inſtance of an alteration of circumſtances, working a revocation upon the ſame principle, by raiſing a preſumption of law, that the teſtator intended to revoke his will. Theſe are modes of revocation in the proper ſenſe of the word. But, ſecondly, wills are alſo ſaid to be revoked in an improper ſenſe of the word, where there is no actual or preſumed intent to revoke proved, or to be collected from the acts or circumſtances of the teſtator, as, where after making his will he has parted with the whole eſtate which he had at the time of making his will, or where the ſame lands have come back again to him under modifications of the intereſt in them, and by force of ſome legal conveyance. In this laſt caſe it will be ſeen, that the will cannot take effect for technical reaſons, but in the former

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caſe it is obvious that the will is rather annulled, as *Wentworth* (*a*) terms it, than revoked. The language of our books, however, is, that the will is revoked. Lord *Hardwicke* in 2 *Atk.* 272. calls the extinguiſhing or deſtroying the thing deviſed a virtual revocation. How improperly it is called a revocation will appear from this conſideration: If a teſtator parts with his eſtate, after making his will, the ſubject is gone, and therefore the will cannot operate: not that the will is revoked; properly ſpeaking it is not revoked, no not even virtually. A revoked will may be re-eſtabliſhed by republication, but republication will not bring back the eſtate upon which it is to operate, and therefore it was that I ſaid, that this is a revocation in an improper ſenſe of the word.

By a conſtruction on the ſtatute of wills, a will can only operate on thoſe eſtates which the teſtator had at the time of making the will, and therefore in pleading, it muſt be ſtated that the party was ſeiſed, that he made his will, and thereby deviſed the lands, and that he afterwards died ſo ſeiſed. If therefore the eſtate has been parted with after the making of the will, but comes back again to the teſtator with modifications of the whole intereſt in it, or if he ſhould afterwards take the whole eſtate back again by purchaſe, the will could not operate upon the new eſtate independent of the law of revocation. The new modified eſtate, ſtrictly ſpeaking, is not the ſame eſtate; and the very ſame quantity of eſtate newly acquired, ſuppoſe it were a fee-ſimple, is not that fee-ſimple which the teſtator had at the time of making his will, but another derived by a different title, and perhaps deſcendible in a different courſe of deſcent. For inſtance, to put a caſe clear of all ſubtlety: ſuppoſe a man ſeiſed in fee-ſimple by deſcent *ex parte maternâ*, were to ſell his eſtate, and ſhould afterwards think fit to buy it again (I avoid the *equivoque* of the word purchaſe), he would take his eſtate back again as a new eſtate, and he would take it as a purchaſer, and it would deſcend to his heirs *ex parte paternâ*; this is a legal quality inherent in a new purchaſed eſtate, and diſtinguiſhes the purchaſed eſtate from the old eſtate; and if we would try the eſtate by that teſt, we ſhould be relieved from the ſenſeleſs jargon of the *quaſi* the old eſtate, which, in ſome of the caſes of revocation, is a term uſed to denote ſomething which is ſuppoſed to be neither the old eſtate nor a new eſtate, but ſomething between both, ſomething perfectly anomalous and unintelligible,

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(*a*) *Offi. of Exec. c.* 1. *ſ.* 6.

with no legal qualities attached to it, and wholly inoperative, except for the miſchievous purpoſes of diſappointing a will.

I have ſtated the principles of the law of revocation as I underſtand them. I am alſo to acknowledge that there is a rule in the ſame law, which, whether fairly deducible from thoſe principles, or not, has been adopted and acted upon, and is therefore become a rule of property, and for that reaſon is ſacred. The rule is this: if the teſtator after making his will, make a feoffment to the uſe of himſelf in fee, or ſuffer a recovery, or otherwiſe convey his eſtate to the uſe of himſelf in fee, his will is revoked. When the caſe *in ipſiſſimis terminis* occurs, we have nothing to do but to ſtate and apply the rule; but it is a very different conſideration, when the the rule is attempted to be applied to another caſe not *ipſiſſimis terminis*. A principle muſt then be extracted from the rule, or from the caſes which have been decided upon the rule, in order to apply the rule and the authority of theſe caſes to the caſe in judgment.

The Counſel have argued in this caſe, that the rule which has governed the caſe of the feoffment, and other conveyance to the uſe of the feoffor &c. in fee, is bottomed in another rule, *viz.* that if after the will the teſtator *parts with his eſtate for a moment, or once diveſts himſelf of his eſtate*, he has revoked his will; and they ſay truly, that this rule will reach to caſes beyond the preciſe caſe of feoffment, or other conveyance to the uſe of the feoffor, &c. in fee. But they can find that rule exemplified nowhere but in the very caſes which they ſuppoſe to flow from it. This is therefore arguing in a circle. When Lord *Hardwicke*, in the caſe of *Parſons* v. *Freeman*, 3 *Atk.* looked for the principle of this prodigious ſtrong caſe, as he called it, of the feoffment, he found it to be this: "It muſt," ſays he, "ariſe from preſumed intention to revoke the will; it muſt be preſumed, that the teſtator would not have made a new conveyance without an intention to revoke his will." If this be the reaſon of the rule, I underſtand it, and I perceive very diſtinctly under what head of revocation I am to claſs theſe caſes: they are not then anomalous or *poſitivi juris*, they are only applications of a clear principle in the law of revocation, that where the teſtator has demonſtrated an intent to revoke his will he has revoked it. If any man feels diſpoſed to reject Lord *Hardwicke*'s reaſon for the rule, let him reject it, but then he muſt be content to underſtand theſe caſes of the feoffment, &c. as governed by a rule *poſitivi juris*, which is confined to thoſe caſes. Theſe few

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obſervations upon the doctrine of revocation will ſerve to ſhew the bearings of my propoſition, that Sir *Thomas Cave* died ſeiſed of his old eſtate, of that eſtate which he had in him at the time when he made his will, and that he has made no demonſtration of an intent to revoke his will; from whence I conclude, that he has not revoked it. As to this laſt part of the propoſition, demonſtration of intent to revoke, I conſider the caſe as deſtitute even of a pretence of revocation upon the ground of alteration of intention, expreſs or implied; indeed, it was expreſsly laid out of the caſe in the laſt argument, and I think very judiciouſly, by my Brother *Adair*.

In conſidering the preſent caſe, for a time I felt a difficulty in my own mind as to the old uſe during the time when Sir *Thomas Cave* was ſeiſed of a baſe fee only, a fee determinable on the event of his marriage. Mr. *Hargrave*, in one of his notes in the new edition of *Coke* upon *Littleton* (*a*), has entered into a laborious diſcuſſion of this difficulty. In ſtrict law the reverter ſeemed to be a poſſibility which veſted in the releſſees of theſe deeds: and on the determination of that baſe fee, when the ſeiſin did revert to the releſſee for the purpoſe of giving effect to the rent-charge, and the term for ſecuring it; I doubted whether the uſe of the fee-ſimple ſubject to that rent-charge, was to be conſidered as the old uſe, or as a new ſpringing uſe; but as that uſe did not ariſe to a ſtranger, but was to be conſidered as an intereſt which had never been diſpoſed of, and all this perplexity aroſe merely from the form of the conveyance, and after conſidering the caſe of *Abbott* v. *Burton*, I ultimately ſatisfied myſelf that it was the old uſe, and in conſtruction of law never out of Sir *Thomas Cave*, from whom the conveyance moved, and that that is the true idea which the word "reſulting" is to be underſtood to expreſs. I proceed to ſhew that it was really the old uſe and the old eſtate of which Sir *Thomas Cave* died ſeiſed. This, I think, cannot be denied, that the intent of the parties to the conveyance by leaſe and releaſe, laſt-mentioned in the ſpecial verdict, and the whole ſubſtantial effect of it, be its formal operation what it may, was ſimply to ſecure a rent charge of 1400 *l.* a-year, by way of jointure for Sir *Thomas Cave*'s intended wife; and that Sir *Thomas Cave*'s eſtate, ſubject to that rent-charge, was not intended to be altered or in any manner affected; and that as far as the form of the conveyance purports to alter the nature and quality of the eſtate, it goes beyond the object of the conveyance.

(*a*) *Vid.* p. 271. *b.* note 1. *Head.* iii. §. 1. though indeed that note is by Mr. *Butler*.

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ance. Now courts of juſtice not only do not incline to allow the form of conveyance to operate beyond the intent of the parties, but they will be ready to adopt all manner of expedients to prevent it: and to confine the operation of every conveyance to the ſpecial purpoſe for which it was made. The caſe of *Abbott* v. *Burton*, which I ſhall have occaſion to ſtate with ſome particularity hereafter, may be referred to as an authority for the general doctrine; and in the caſe of *Parſons* v. *Freeman*, 3 *Atk.* Lord *Hardwicke* applies it to the particular caſe of revocation, laying it down as a general rule in the law of revocation, that a conveyance for ſpecial purpoſes, whether it be leaſe and releaſe, feoffment, fine, or recovery, ſhall not operate beyond that purpoſe, and againſt the intent of the party to revoke his will. In this caſe it muſt be admitted that, by the form of the conveyance, Sir *Thomas Cave* took a baſe fee under it which determined upon the marriage, when the ſeiſin reverted to the releaſee for the purpoſe of executing the only uſe of the conveyance, the jointure to his wife, and for that purpoſe only: for though the conveyance alſo affected to diſpoſe of the reſt of the uſe, I take the law to be perfectly clear that it was in Sir *Thomas Cave*, independent of that diſpoſition. The purpoſe to be effected by all this form is then ſimply the ſecuring a jointure to the lady whom Sir *Thomas Cave* ſhould marry; and if this purpoſe had been effected by another mode of conveyance, the law is clear that the will had not been revoked. But Lord *Hardwicke* has ſaid, that, be the form of conveyance what it may, this is inſtrumental only if the conveyance be for a ſpecial purpoſe which is not revoked. I do not mean to adhere to the letter of my Lord *Hardwicke*'s expreſſion "for the ſpecial purpoſe." it muſt be a purpoſe which leaves the ſubſtance of the fee untouched to go according to the will, a purpoſe therefore not inconſiſtent with the will. If the ſpecial purpoſe require that the whole fee ſhould even eventually be diſpoſed of by the conveyance, then I agree the will is revoked.

Upon this ſingle ground that this is a conveyance for a ſpecial purpoſe which does not exhauſt the fee, but in truth leaves the fee undiſpoſed of, and in conſtruction of law not limited by the inſtrument, I take it to be clear, that this is not a caſe of revocation; but ſtill it will be neceſſary for the leſſor of the Plaintiff to make out, what he muſt have averred in pleading, that the teſtator died ſeiſed of the eſtate which he deviſed. Now, put the caſe that theſe deeds of leaſe and releaſe had not even purported to limit the remainder of this eſtate at all; what would have become of the intereſt in this eſtate, ſubject to the jointure, and the term created for ſecuring it? Muſt not the uſe have reſulted to Sir *Thomas Cave* as that which never had been diſpoſed of by him from whom the eſtate moved? At the common law the uſe was always intended to be in the feoffee or conuzee; and it is ſtated by Lord Ch. J. *Holt*, in Ld. *Angleſea* v. Ld. *Altham*, 2 *Salk*. 676. that for that reaſon, in pleading, it was never averred: whereas, if the uſe was to the feoffor or conuſor, it muſt be averred. I admit, that there is in this caſe an expreſs limitation of a remainder in fee to Sir *Thomas Cave*. What difference will this make? There is another propoſition in law, that the uſe which is declared, and which would have reſulted if it had not been declared, is one and the ſame. And this is not a dry propoſition, productive of no legal conſequence, the courſe of deſcent is regulated by it. For inſtance, the uſe which reſults would be deemed the ancient uſe, and if the eſtate were in the party by deſcent *ex parte maternâ*, the eſtate which reſulted would continue to deſcend in that courſe. And ſo it is where the uſe is expreſsly *limited* to the party from whom the eſtate moved, it will be in him as his old eſtate, and continue deſcendible to his heirs *ex parte maternâ*. This is the doctrine of *Coke* upon *Litt*. *fo*. 13.; it is recognized and acted upon in the caſe of *Abbott* v. *Burton*, which was in this court upon a ſpecial verdict, and is reported in 2 *Salk*, 590.; and that caſe was recognized and a ſimilar determination made in the caſe of *Martin ex dem. Tregonwell* v. *Strachan*, *Hil*. 16 *Geo*. 2. in *B. R.* a full note of which caſe is to be found in 5 *Term Rep*. *fo*. 107. The rule of deſcent, ſays Lord Ch. J. *Lee*, in this laſt caſe is known and will be agreed; "If a man ſeiſed as "heir on the ſide of the mother, make a feoffment in fee to the "uſe of himſelf and his heirs, the uſe being a thing in truſt and "confidence, ſhall enſue the nature of the lands, and ſhall deſcend "to the heir on the part of the mother, *Co. Litt*. 13. *a*. 3 *Lev*. 406. "*Godbolt* v. *Freeſtone*." He goes on, "and it will be the ſame if the "limitation be by fine and recovery; it is ſtill the ancient uſe, and "there is no difference, whether upon the conveyance of an eſtate "any part of the uſe reſults by implication of law, or whether it "be reſerved by expreſs declaration to the party from whom the "eſtate moved. And ſo is the caſe of *Abbott* v. *Burton*, *Salk*. "590." In *Abbott* v. *Burton*, they attempted to alter the deſcendible quality of the uſe by arguments drawn from the form of the conveyance which was fine and recovery. To this the Ch. Juſtice ſaid, that the fine and common recovery were both to be taken as one

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one entire conveyance conſiſting of theſe ſeveral parts, and directed as to the uſe of them by the ſame covenants. That *though the conuſees had a ſeiſin in fee of the eſtate and uſe veſted in them by the fine for a ſpecial purpoſe*, and upon that ſeiſin the common recovery was had, and in ſtrictneſs the eſtate paſſed by it was their eſtate, yet upon conſideration of the whole conveyance the eſtate did originally move from *J. S.* who was the conuſor of the fine. And for that reaſon, *if there had been no limitation at all of this remainder of the uſe upon this recovery, he took it to be very clear, that, ſo much as remained unlimited, ſhould reſult to the conuſor and his heirs, and not to the conuzee, in whom the eſtate was not veſted with a purpoſe to create him an intereſt, but in order to forward and complete the conveyance of the conuſor's eſtate* which was taken as one conveyance. "Then," ſays the Ch. Juſtice, "does the uſe limited upon the "common recovery *as properly ariſe out of the eſtate that moved* "*from the conuſor of the fine as if he had made a feoffment, or fine, or* "*any ſingle conveyance* to that uſe." This doctrine relieves us from all difficulties ariſing from the form of the conveyance, and abundantly juſtifies my obſervation, that courts of juſtice are not inclined to allow the form of a conveyance to operate beyond the intent of the parties: but it goes a great deal further. Lord Ch. Juſtice *Trevor* had ſaid in a former part of this caſe what Lord Ch. Juſtice *Lee* repeated in *Martin* v. *Strachan*, that it was the ancient uſe, and that there was no difference when upon the conveyance of an eſtate any part of the uſe reſults by implication of law, and when it is referred by expreſs declaration to the party from whom the eſtate moved. In the part which I have copied from the book, he ſays, that the uſe limited upon the common recovery ariſes out of the eſtate which moved from the conuzor of the fine, and not out of the eſtate of the conuzee. We know that it is the definition of a uſe when ſeparated from the land, that it is collateral to the ſeiſin of the land, and that when the ſtatute unites the ſeiſin to the uſe, the union is of the ſeiſin to the uſe according to the quality of the uſe, and not according to the quality of the ſeiſin: from which premiſes the concluſion appears to me to be direct, that if the uſe is the old uſe, when the ſeiſin is united to it, it muſt be the old eſtate; and my farther concluſion is, that Sir *Thomas Cave* died ſeiſed of that eſtate of which he was ſeiſed at the time when he made his will, with this alteration (I am ready to admit,) that by means of theſe deeds of leaſe and releaſe, he has created a charge upon it of 1400*l.* a-year, with a term of five hundred years for ſecuring the payment of it.

Alterations in the eſtate of the teſtator will, I admit, in many inſtances work a revocation of his will. It is one of the general heads of revocation; but I have ſaid that the law is clear, that an alteration in the eſtate of this nature will not revoke the will. It has been ſettled over and over again, that a leaſe made for years, or even for life, after a deviſe in fee, will not revoke the will; both theſe caſes are put in the caſe of *Montague* v. *Jefferies*, *Roll. Abr.* and agreed to be good law. And there are ſeveral modern caſes to the ſame effect. In *Coke* v. *Bullock*, *Cro. Jac.* 49. it was held, that where *A.* by will deviſes to *B.* in fee, and afterwards by indenture makes a leaſe for years of the ſame land, this leaſe if not made to the ſame perſon, (where upon another principle it would be a revocation) ſhall be a revocation *pro tanto* only. They call it a revocation *pro tanto*, but this is uſing the word in an improper ſenſe. The truth is, that a part of the thing deviſed is gone, and therefore the will cannot operate upon it. It happens that in our caſe there is no pretence to call this even a partial revocation, for the will purports to operate only upon that part of the fee which ſhould remain with Sir *Thomas Cave*, after making ſuch a jointure upon any wife whom he might marry, as he ſhould think fit to make, in which reſpect this caſe is perfectly new in circumſtance, and unlike every other caſe to be found in our books. And it happens too, that the circumſtance in which it is new, goes to exclude all pretence for preſuming an intent to revoke; for the deeds of leaſe and releaſe reſpect nothing but that which was expreſsly reſerved out of the will, ſo far from being inconſiſtent, or in any manner interfering with each other, *they amount in effect to one conveyance of Sir* Thomas Cave's *eſtate to thoſe uſes which he has himſelf declared by the will and ſubſequent ſettlement.*

Theſe caſes which I laſt mentioned, and have alluded to, were not denied to be law in the argument at the bar, nor was it inſiſted that an alteration of the eſtate by a mere interpoſition of an eſtate for life or years, to ſome ſtranger, would work a revocation. How is it then, that Sir *Thomas Cave*'s will is revoked not upon the ground of an intent to revoke? That ground was abandoned, and, I repeat, judiciouſly abandoned by my brother *Adair* on the ſecond argument. He ſtated the ground of the revocation to be, that a poſitive rule of law, ſettled by a ſeries of deciſions, had pronounced that certain acts done by a teſtator would be a revocation of his will, let his intent be what it might, and even againſt his manifeſt intent. To that propoſition I entirely agree. But we muſt ſee what thoſe acts are. He conſidered it as admitted, that the change of the eſtate of the teſtator, a new eſtate and new uſes, would be a revocation; I admit it would. He ſtated, that it was a rule of law, that where a teſtator *has for a moment parted with the eſtate, whether it comes back or no, the mere diveſting of that eſtate* is a revocation, and this even though he is in again of the old uſe, and he ſtated it to be law, that the taking back an eſtate through the channel of a truſtee, is a change of the eſtate, and within the rule. To a certain extent, I admit every one of theſe inſtances of revocation, except that I do not agree that the mere diveſting of the eſtate where the party is in again of the old uſe, will be a revocation; and I can agree that even that caſe was good law, before the ſtatute for transferring of the uſes into poſſeſſion; for, I do agree, that if the teſtator who had the fee in him when he made his will, diveſted himſelf of that eſtate, and took back nothing but the old uſe, that old uſe was not that which he had deviſed, and could therefore not paſs by his will, and that in the improper ſenſe of the word "revoked" the will might be ſaid to be revoked. By putting caſes upon the rules laid down by my brother *Adair*, it will be underſtood to what extent I agree with him. If a teſtator makes a feoffment in fee to a ſtranger, and afterwards (the next minute if you pleaſe) takes back a fee by re-conveyance, this taking back the eſtate through the channel of a truſtee would be changing the eſtate. That fee will not be the fee which he deviſed, and ſo his will may be ſaid to be revoked. If he made a feoffment in fee to the uſe of himſelf and his heirs, or declaring no uſe ſo that the uſe reſulted, before the ſtatute of *H*. 8, that uſe would not be the eſtate which he deviſed, and could not paſs. So of the converſe of that caſe which is a caſe adjudged. But the rule ſtands upon a much broader bottom than this momentary diveſting of the eſtate. The eſtate in theſe inſtances never comes back again at all, and therefore there is nothing for the will to act upon. I can put one caſe where the eſtate is diveſted perhaps for a conſiderable length of time, and yet does afterwards come back again, in which I take the law to be clear, that the will is not revoked. The caſe I allude to is, where the teſtator after making his will is diſſeiſed, and in conſequence of his entry afterwards, is remitted. The ſubject is diſcuſſed by Lord Ch. Juſtice *Holt*, in 11 *Mod. fo.* 128. I am aware, that this remitter is by the act of law, and I am not arguing that the party can by his own act remit himſelf in the ſame manner. That is not the uſe I propoſe to make of this caſe of diſſeiſin. Let us purſue the ſubject a little further. Put the caſe that the party diſſeiſed dies without having entered. His will is revoked. I aſk, why is it revoked? The anſwer is, becauſe he has not died ſeiſed. In that caſe the will is not revoked becauſe he intended to revoke it, nor becauſe his eſtate was once diveſted; but becauſe *he died without reveſting it*, and therefore *did not die ſeiſed*, and as I conceive it is only when it is followed up with that conſequence, and only in reſpect of that conſequence, that in any caſe parting with the eſtate, independent of intent, does amount to a revocation.

For the purpoſe of maintaining and inforcing this doctrine, that the parting with the eſtate for a moment is a revocation, it was ſaid, that the party muſt not only have the eſtate in him when he makes his will, and muſt die ſeiſed of it, but he muſt continue to have the ſame eſtate from the time of making the will to the time of his death. This propoſition, to whatever extent it can be maintained, does not appear to me to advance the argument; it ſeems to be the former propoſition in other words. If a teſtator muſt not part with his eſtate for a moment he muſt continue to have the eſtate; if he parts with the eſtate he does not continue to have it; if he continues to have it he does not part with it. There are not many poſſible caſes in which a man could be ſaid to die ſeiſed of the eſtate which he has parted with in his life time. The caſe of the diſſeiſee remitted is the only adjudged caſe I know of which comes near it, and that caſe does not touch the queſtion; for by the aid of a fiction of law to which we are obliged to reſort, we ſay that the eſtate was never out of the diſſeiſee, and therefore he died ſeiſed of the ſame eſtate.

Purſuing the argument of my brothers *Adair* and *Heywood*, I am ready to admit, that alterations of the eſtate ordinarily will revoke; in many caſes they will do ſo becauſe they afford an implication of intent to revoke. The man who deviſes the whole fee-ſimple, and afterwards makes a ſettlement of his eſtate, leaving himſelf only an eſtate for life, and a reverſion far removed by intermediate eſtates, has ſo altered his eſtate as to demonſtrate that he does not mean that his will ſhould take effect, and therefore, though after all his alterations, there is ſomething of the old eſtate left upon which the deviſe might by poſſibility operate, it is fair to conclude, that he did not mean his will ſhould have any effect at all. This would be a revocation, but upon a ground very different from that which is taken by my brothers in their arguments: it does not proceed ſimply upon the alteration of the eſtate working by a mere arbitrary rule a revocation, it is a revocation upon a ſolid acknowledged principle in the law of revocations, a preſumed intent to revoke. Alteration of eſtate which is not powerful enough to raiſe an implication of intent to revoke and yet does revoke, will bring us back to the ground which we have already trodden, it muſt be that which will ſhew that the eſtate of which the party died ſeiſed is not that eſtate which he took upon himſelf to deviſe, and this will bring it within the ſcope of another principle of revocation to which I have declared my aſſent, and which indeed is ſelf-evident, that a will cannot operate upon an eſtate which a man has parted with after making his will. It will moſt frequently happen, that where the eſtate of which the teſtator was ſeiſed at the time of making his will, is afterwards changed by whatever form of conveyance, whether it paſſes from him and returns by re-conveyance, or whether the modification is produced by one conveyance ſo as to be ſubſtantially a different eſtate from that which he had before, the will may be ſaid to be revoked upon all the grounds of revocation. It may be ſaid that it was intended to be revoked, or whether *intended* or not, the *old eſtate* is gone, and as to that which is taken in the room of it by a technical rule of law, now not to be controverted, a will cannot operate upon an eſtate in land *acquired ſince* the making of the will, and therefore the new eſtate cannot paſs. My brother *Adair*, under this head of alteration of eſtate, laid it down as a rule, that taking back an eſtate through the channel of a truſtee alters the eſtate. This is true, taken literally, and underſtanding the taking back to be by re-conveyance; which is the explanation given of a paſſage in *Coke* on *Litt.* where he ſpeaks of a feoffment, and the feoffor taking back an eſtate to him and his heirs. But if it was meant to extend to the caſe of the uſe which reſults upon a conveyance, it is begging the queſtion, and in truth the propoſition ſeems wholly inapplicable to a reſulting uſe. Firſt, a reſulting uſe is not taken back through the channel of the feoffee, conuzee, &c. but is a thing collateral to his eſtate, and ariſes out of the eſtate of the feoffor as a thing never diſpoſed of; and ſecondly, the uſe which reſults, by whatever channel it reſults, is not altered, but is the old uſe, and I think, I have proved, when united to the ſeiſin, becomes the old eſtate, and I think it a contradiction in terms to aſſert, that the old uſe and the old eſtate, is an altered uſe and an altered eſtate, and that the ſanction of the greateſt names will not make it out.

From this examination of the argument at the bar, I am led to conclude, that there is no ſuch poſitive rule of law, as that every alteration of an eſtate, every parting with an eſtate, every diveſting of an eſtate, will amount to a revocation, but that there are certain principles which govern the law of revocation, to which the ſeveral inſtances which occur of alteration, of parting with, and diveſting of eſtates, are to be referred, and by which the effect of them is to be determined. When we are trying caſes by principles, the law is indeed a ſcience. What ſhall we ſay of it, if it is to be argued with ſucceſs, that if a teſtator having deviſed the fee-ſimple of his eſtate, makes a leaſe for years or for life, the will as to the reverſion in fee is not revoked, but that if he ſhould be ſo unfortunate as to be adviſed to do the ſame thing by leaſe and releaſe, it ſhall be revoked? *It ſhall becauſe it ſhall;* the rule is poſitive, and we muſt not preſume to aſk for the reaſon of it. It is certainly prudently done to ſhield it from all examination, becauſe examination will point out the falſehood and the abſurdity of it. The old caſes ſtate the principles of the law of revocation moſt correctly. They ſay a will can only operate upon the eſtate which the man has at the time of making his will, and of which he died ſeiſed: they ſay by neceſſary conſequence a will cannot operate upon an eſtate purchaſed by the teſtator after making his will; therefore according to the caſe of 44 *E.* 3. which my brother *Heywood* ſtates to be the oldeſt caſe on the ſubject, if a deviſor *aliens* the land and *re-purchaſes*, yet is the will revoked. By the way, what a refinement is it to ſay, that the diveſting of the eſtate for a moment, though the party is in again of the old uſe, ſhall be a revocation? Is this alienation? Is it re-purchaſing? We know them by their fruits.

They ſay, that if a teſtator intends to revoke his will, the will is revoked, and they ſay that all acts done by the teſtator after the making of his will, which are inconſiſtent with his will, are grounds upon which a preſumption of law ariſes that the teſtator does intend to revoke his will.

Had the ſeries of caſes with which we are loaded, as they occurred, been brought fairly to the teſt of theſe principles, we ſhould not have been at this day entertaining different opinions upon the caſe now in judgment, but unfortunately theſe principles are ſo jumbled together, and confounded in the caſes as they are reported, that in many of them I find it difficult and almoſt impoſſible to develope the particular principle upon which they are determined. This gives them the appearance of mere arbitrary deciſions; and then it is ſaid, with great colour, I admit, of authority, that by a poſitive rule of law, certain acts done by a teſtator, do amount to a revocation of his will. The caſes which were ſelected from the maſs by my brothers *Adair* and *Heywood*, will be a very good ſpecimen of the whole; it will be neceſſary for me to take ſome notice of them, that it may be ſeen how far they go towards eſtabliſhing this poſitive rule of law which they rely on. My brother *Heywood* ſtated the caſe 44 *E.* 3. (which I have juſt now referred to) to be the oldeſt caſe on this ſubject. If a teſtator ſays the books, aliens and re-purchaſes, yet his will is revoked. I agree that this caſe is good law; I rely on it as a main ſecurity to the foundation of my argument; to borrow Lord Ch. Juſtice *Wilmot*'s metaphor, it is my polar ſtar. If a teſtator *aliens* and *re-purchaſes*, I agree that his will is revoked: but if he dies ſeiſed of the ſame eſtate, I am of opinion, that he has neither aliened nor re-purchaſed. My brother *Heywood*'s next caſe was *Winkfield*'s caſe, *Mich.* 29 *Eliz.* in *C. B.* it is reported in *Owen* (*a*) *Goldsborough* (*b*) and *Godbolt* 132. I cite it from *Godbolt*. *Winkfield* deviſed lands in *Norfolk* to one *Winkfield* in *London*, goldſmith, and to his heirs in fee, and afterwards he made a deed of feoffment thereof to divers perſons unto the uſe of himſelf for life, without impeachment of waſte, remainder unto the deviſee in fee: but before he ſealed the deed of feoffment he aſked one if it would be any prejudice to his will; who anſwered no. And the deviſor aſked again if it would be any prejudice, becauſe he conceived he ſhould not live until livery was made: and it was anſwered, no. Then he ſaid, he would ſeal it; for his intent was, that his will ſhould ſtand; and afterwards livery was executed upon part of the land, and the deviſor died. *Rhodes* and *Periam* Juſtices—The feoffment is no countermand of the will, becauſe it was to one perſon, but, perhaps, it had been otherwiſe, if it had been to the uſe of a ſtranger, although it were not executed. *Anderſon* C. J. *and others*—The will is revoked in that part where the livery is executed; and he ſaid, it would have been a queſtion if he had ſaid nothing. And all the Juſtices agreed, that a man may revoke his will in part, and in other part not, and he may revoke it by word, and that a will in writing may be revoked by word. *Periam* ſaid, *it is no revocation by the party himſelf, but the law doth revoke it; to which* Windham *agreed, but he ſaid, that if the party had ſaid nothing when he ſealed the feoffment, it had been a revocation of the party, and not of the law.* *Periam*—If the witneſſes

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(*a*) p. 76. there called *Gibſon* v. *Muteſs*. (*b*) p. 32. there called *Gybſon* v. *Platleſſe*.

neſſes die ſo as he cannot prove the words ſpoken at the ſealing of the feoffment, the feoffment will deſtroy the will, and ſo he ſpake to *Anderſon* who did not deny it. All this was delivered by the Juſtices upon evidence given to a jury at the bar. From this converſation, in the ſhape of directions to a jury at a trial at bar, in which they ſeem to have mooted rather than to have gravely reſolved any point of law, it may be collected, that the diſtinction between a revocation by the party, and a revocation by operation of law, was at that time ſufficiently familiar. The doubt which ſeems to have ariſen was, whether ſo much of the lands included in the feoffment, whereof no livery had been made, would paſs by the will or not. I collect, though it is not diſtinctly ſtated, and though ſome of the Judges thought that the expreſs declaration would prevent the incomplete part of the conveyance from operating as a revocation, in which the good ſenſe of the caſe was certainly with them, that the Judges were ultimately of opinion, that the lands would not paſs, but upon what principle they meant ſo to reſolve it, is not ſtated in the caſe, nor does it ſeem to have been agreed. But reduce the caſe to its principle, and it will be found to be a very plain caſe upon very clear principles. The teſtator preferred that the deviſee ſhould take his eſtate under the feoffment in preference to his will, or why did he propoſe to make a feoffment? The moment he had demonſtrated that preference, the will was revoked upon the ground of an implied intent to revoke it. Apprehenſive that he might not live to finiſh the work he had begun, he deſires to know, whether the making this deed of feoffment would revoke his will, ſaying, that he did not mean to do that. But he certainly did mean to revoke his will, if he lived to complete the feoffment: what he was anxious about was, that his will ſhould not be revoked until the feoffment could take effect. They gave him bad advice upon this ſubject. The law and his wiſhes were in direct oppoſition to each other. Having once demonſtrated an intention to revoke his will, that did revoke his will, not only as to that part of the eſtate which he had effectually given to the deviſee by the feoffment, but alſo as to that part of it which he had begun to give him by a conveyance which never took effect, becauſe he died before the livery was completed. This is ſuppoſed to be a caſe in which the will was revoked by operation of law againſt the intent of the party; the contrary is the truth. The teſtator did intend to revoke his will, but he alſo meant to make terms with the law, that it might not be revoked till what he was doing was

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completed. Thoſe terms he could not impoſe. He had revoked his will upon the ground of an implied intent to do it as ſoon as he begun to do an act inconſiſtent with the will, *in its operation inconſiſtent with the operation of the will.* For when we ſpeak of the intent of the will, we do not mean to ſpeak of the general intent of the teſtator, that his deviſee ſhould ſomehow or other have his eſtate, but that he ſhall have it by the operation of that will, and when he has reſolved afterwards that he ſhall have it by the operation of a feoffment, he has certainly altered his mind, and no longer intends that he ſhall have it by the operation of his will, and conſequently he has revoked his will. As to that part of the land reſpecting which the feoffment was complete, he has revoked his will, upon both grounds of revocation: he intended to revoke, and he has parted with the eſtate, which would annul his will, whether he intended it or not. With reſpect to the lands of which livery had not been made, and therefore the conveyance is incomplete, the will is revoked upon ground of intent only, and the caſe of a bargain and ſale without inrollment proceeds upon the ſame principle. This caſe of a bargain and ſale without inrollment, and another caſe upon the effect of an incomplete conveyance as a revocation are to be found in 1 *Roll. Abr.* 615. *P. pl.* 5 & 6. and the ground upon which they are held to be a revocation is there expreſsly ſtated. If a man ſeiſed of a reverſion, expectant upon an eſtate for life, deviſe it to *J. S.*, and afterwards by his deed grant the reverſion in fee to *J. D.*, though the leſſee never attorn, yet this is a revocation *inaſmuch as he hath fully ſhewed his intent that the other ſhould have it, and put it in the power of the leſſee. Mich.* 38, 39. *El. B. R. per Popham* and *Gawdy*. So if a man deviſes lands to *J. S.*, and after bargains and ſells to *J. D.*, and acknowledges it before a doctor, to be inrolled according to the ſtatute, though it be not inrolled within the ſix months, yet that ſhall be a revocation of the will, *for the cauſe aforeſaid. M.* 38, 39 *Eliz. B. R. per Popham & Gawdy, agreed.* I have dwelt the longer upon this caſe from *Godbolt*, becauſe it is a very clear and ſatisfactory illuſtration of almoſt the whole doctrine of revocation.

The next caſe in the order of time cited by my brother *Heywood* was from *Moore* 789. and was in the 2d year of the reign of *James* I. It was a caſe in the *Exchequer*, and ſeems to have ariſen upon a queſtion of eſcheat. *Huſſey* made his will, by which he deviſed a manor; afterwards he made a feoffment of the ſame manor, to the uſe of ſuch perſons, and for ſuch eſtates as he had declared by his will: it was adjudged, that the feoffment was a countermand of his will, but that the countermanded will was a ſufficient declaration of the uſes of the feoffment, and therefore though he was a baſtard, there was no eſcheat to the crown. This caſe is alſo a good illuſtration of this doctrine of revocation. The book ſays, that the feoffment countermanded the will, which word "countermand" is equivalent to "revoke"; in the improper ſenſe of the word it did countermand or revoke the will, becauſe the teſtator parted with his eſtate. This was ſaid to be a revocation againſt the intent of the teſtator, and put as one of the ſtrongeſt caſes of revocation by operation of law, upon the mere ground of alteration in the eſtate. Whereas, firſt, the teſtator intended that his eſtate ſhould paſs not by his will, but by the feoffment, and ſecondly, it was not merely becauſe the eſtate was altered that the will was revoked, but becauſe it was ſo altered, that according to the rules of law, which govern the operation of wills, it was abſolutely impoſſible that the will could operate as a conveyance of the eſtate, for this unanſwerable reaſon, becauſe the teſtator did not die ſeiſed of it: yet was not his will revoked in the proper ſenſe of the word altogether; and even as to theſe lands, it could not operate as a conveyance of the eſtate, for the reaſon I have aſſigned, but it was allowed to operate as a declaration of the uſe of that very inſtrument which had prevented it from operating upon the eſtate itſelf; whereas, if the will had been actually revoked in the proper ſenſe of the word as to this manor, it could have had no operation at all. The Court of *Exchequer* carried this odious doctrine of revocation no further than they were abſolutely obliged to go. They could not give the will effect upon an eſtate which was gone from the teſtator, but they ſtill conſidered it as a will, and gave it all the effect that it could have, namely, as a declaration of the uſes of the feoffment.

My brother *Adair* cited a caſe of *Lutwych* v. *Mitten*, in the Court of *Wards*, *Trin.* 16 *Jac.* 1. from 1 *Roll. Abr. tit. Deviſe*, 614. which, though not reſembling the caſe in *Moore*, in circumſtance, and though the debate upon it aroſe upon a point collateral to the doctrine of revocation, ſeems referable to the ſame claſs of caſes. If a man covenant by indenture to levy a fine, and that it ſhall be to the uſe of ſuch perſons as he ſhall name by his will, and afterwards makes his will, and thereby deviſes his land to certain perſons, and after that levies a fine in performance of this covenant, this is ſaid to be a revocation of the will, though it was levied in performance of the covenant which was entered into before the making the will. The reaſon given is, that the land cannot paſs by relation to the time when the covenant was made, but only to the time when the fine was levied. Now this appears to me to differ in circumſtance from the caſe in *Moore*, but as far as it concerns the preſent argument to be in effect the ſame caſe. Here the fine was levied in purſuance of a covenant to the uſe of ſuch perſons as the party ſhould name by his will; there the feoffment was made without any ſuch covenant, but to the ſame uſes. That ſeems to have been admitted here, which was reſolved there upon debate, that by the fine made after the will the lands paſſed, and that this countermanded, revoked, or annulled, by whatever name we call it, the will. If the land did paſs, I have agreed, that this would be the conſequence. There was a ſtruggle to avoid the conſequence, by giving the time of the eſtates paſſing from the deviſor a relation back to the time of the covenant. The Court thought that could not be, and I am not at preſent called upon to debate that point, as I agree with my brothers, that the articles ſtated in this ſpecial verdict are to be laid out of the caſe. The debate might, I think, have taken a turn more favourable for the deviſee, if upon the authority of the caſe in *Moore*, they had inſiſted that the will was a good declaration of the uſe of the fine.

One other old caſe was referred to in the argument, which I take to have been the caſe of *Montague* v. *Jefferies*, and it is to be found in *Roll's Abridgment*, under the ſame title *Deviſe*. The caſe is put two different ways. If a man deviſes lands to *J. S.*, and after makes a feoffment in fee thereof to a ſtranger, to the uſe of himſelf in fee, though he hath his *old eſtate*, yet it ſeems this is a revocation, for *his intent* was to *have it by the new limitation*, and by the feoffment he paſſed the eſtate, and the *ſtatute reveſted it in him* which is as *a new purchaſe*. *Contrà Mich.* 38, 39 *El. B. R. per Popham.* So if a man deviſes lands to *J. S.* in fee, and after makes a feoffment thereof to another to the uſe of himſelf for life, the remainder to his wife for life, the remainder to his own right heirs in fee, though here he hath his *old reverſion*, yet it ſeems that it was *his intent to have it paſs by the livery*, and to be *in by the ſtatute and limitation*, and *ſo as a new purchaſe*, and therefore it ſeems that this ſhall be a revocation of the fee, as well as for the life of the *Feme*. *Contrà M.* 38, 39 *Eliz. B. R.* between *Montague* and *Jefferies*, *per curiam* agreed. The caſe firſt ſtated, appears not to have been decided with the approbation of the whole Court. My Lord Ch. Juſtice *Popham*, who was a very able Judge, was of a different opinion.

nion. Though he hath his old eſtate, ſays the book, yet it ſeems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he paſſed the eſtate, and the ſtatute reveſted it in him, which is as a new purchaſe. Two reaſons are given here for the judgment, and I agree with my Lord Ch. J. *Popham*, that neither of them is ſatisfactory. What is meant when it is ſaid that a man intends to have an old eſtate by a new limitation, or what conſequence would an intent to have the eſtate by a new limitation be of, if in truth, whatever was his intent, he had it not by a new limitation, but it was the old eſtate? By the feoffment, it is ſaid, he paſſed the eſtate, and the ſtatute reveſted it in him, which is as a new purchaſe, but moſt clearly this is not as a new purchaſe; that point has been decided over and over again, and ſo lately as in the caſe of *Martin* v. *Strachan*, by my Lord Ch. Juſtice *Lee*, in a ſolemn judgment upon a ſpecial verdict, which caſe I have before had occaſion to take ſome notice of. In the ſecond caſe, there was, I muſt confeſs, a new limitation, for there is an eſtate in remainder to his wife for life, interpoſed between the limitation to himſelf for life and the remainder in fee. If any thing turns upon this circumſtance, I am not called upon to debate it, for there are in our caſe no ſuch eſtates for life interpoſed. In every other reſpect, it is the ſame caſe with the former, ſupported by the ſame very bad reaſons. It is obſervable, that the ſame point is ſaid to have been adjudged in a ſubſequent caſe, *Cro. Car.* 24.; but there another reaſon is given for the judgment, namely, that becauſe he *departed with all the eſtate*, it ſhall be a revocation, and ſhall not be good without a new publication. Here the ground of the argument is ſhifted, and I muſt conclude, that it was ſhifted becauſe the reaſons aſſigned in the caſe of *Montague* v. *Jefferies* were unſatisfactory. To my apprehenſion, however, the reaſon for the judgment which is now aſſigned is equally unſatisfactory. I take it, that in this caſe, the teſtator had not departed with all the eſtate; that in the firſt of the two caſes the whole of the old uſe (and which had force enough to draw to it the legal ſeiſin which had been departed with for a moment), never had been departed with, but remained with him from whom the eſtate moved, and in the ſecond caſe, part of the old uſe had never been departed with, but remained with him from whom the eſtate moved; and no more of the uſe was parted with, in either caſe, than what might be parted with according to the authorities which I have before referred to, and might produce a revocation *pro tanto*,

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without revoking the will generally. This obſervation, however, ariſes upon the two caſes ſtated in the caſe of *Montague* v. *Jefferies*, that they do not lay down an arbitrary rule by which they revoke the will: they refer the caſe to a principle in the law of revocation. His intent, the book ſays, in the firſt caſe, was to have it by the new limitation; in the other caſe, it is ſaid, it ſeems that it was his intent to have it paſs by the livery, and to be in by the ſtatute and limitation. The principle of the caſes is therefore right, though the application of that principle in the particular inſtances may be deemed very erroneous. The caſe of *Diſter* v. *Diſter*, which was in this Court in *E.* 35 *Car.* 2. was alſo cited from 3 *Lev.* 108. Tenant in tail makes his will, and deviſes his land, and then by bargain and ſale inrolled, makes a tenant to the *præcipe*, againſt whom a common recovery is ſuffered, with voucher of tenant in tail, to the uſe of himſelf in fee. This was held to be a revocation, and the reaſon of the determination is, that by the bargain and ſale, and the recovery, all the eſtate was altered after the will. I take for granted, that this tenant in tail had at the time of the will, the reverſion in fee alſo in himſelf, and that this was the eſtate which the will was intended to operate upon; otherwiſe, I do not ſee what it was that he could deviſe; if it were ſo, the caſe is the ſame with a ſubſequent caſe alſo cited from 3 *P. Wms.* of *Marwood* v. *Turner*, 163., and they are both very clear caſes of revocation, though perfectly inapplicable to the preſent caſe. The reverſion in fee was the thing deviſed, but the effect of the recovery was abſolutely to deſtroy that reverſion in fee, and to introduce a new fee-ſimple in the room of the eſtate tail. This is proved by the well eſtabliſhed difference between tenant in tail, with reverſion to himſelf in fee, levying a fine, and ſuffering a recovery. If he levies a fine he extinguiſhes the eſtate tail, and lets in the reverſion which becomes the fee-ſimple abſolute, inſtead of the fee-ſimple expectant, and in conſequence lets in all the incumbrances of his anceſtors upon that reverſion. Whereas, by ſuffering a recovery, the recoveror deſtroys the reverſion and all the incumbrances upon it, and gains a new fee-ſimple to himſelf. The effect of the recovery, therefore, is rightly deſcribed to be that by the bargain and ſale, and recovery, all the eſtate is altered after the will, and where all the eſtate is altered, I am quite ready to agree, that this is a revocation, not that the word "altered" has any force to revoke the will, but becauſe it is *ex rei neceſſitate*, to uſe the words of another caſe which I ſhall have occaſion to take notice of hereafter, a revocation. The party does not die ſeiſed of the eſtate which he deviſed, and therefore, by no poſſibility can his will take effect. The caſe of *Galton* v. *Hancock*, reported by Mr. *Tracey Atkyns*, in his ſecond volume 425. was determined by my Lord *Hardwicke*, upon the ſame principle of neceſſity. There one deviſed his lifehold eſtate, and afterwards purchaſed the reverſion in fee; the lifehold eſtate merged and was gone, and the will *pro tanto* revoked. Some older, and ſome ſtill more modern caſes, have proceeded upon the ſame principle. *Ceſtuy que truſt* deviſes his truſt eſtate, and afterwards gets in the legal eſtate in which the truſt merges; the thing he deviſed is gone; the will is therefore revoked at law. There is an older caſe which is ſtronger, and not quite a clear caſe, but it proceeds upon the ſame principle, and therefore I take notice of it. *Ceſtuy que uſe*, before the ſtatute of *H.* 8. deviſes the uſe, then comes the ſtatute of *H.* 8. which unites the ſeiſin to the uſe; the uſe merges and is gone: the thing deviſed being gone the will is revoked. This is certainly the reaſon of the determination, though it is not ſo expreſſed. The judges are only made to ſay that the will is revoked, becauſe the King's ſubjects are parties to an act of parliament, and bound to take notice of it (*a*).

The Counſel then put the caſe of a teſtator, who, after his will made, ſurrenders his leaſe for lives, and accepts a renewal, which has been held to be a revocation. We are now approaching to modern deciſions, and I muſt agree, that hard as this caſe is, ſuch is the law. A part of the caſe of *Marwood* v. *Turner* was decided on this very point. The ſurrender puts all out of the teſtator that he had, and he never gets that back again; of neceſſity, therefore, his will is annulled. That which it ſhould have operated upon is gone, and that which he has acquired in the room of it, it cannot operate upon; this is a revocation, therefore, upon the moſt acknowledged principles of revocation. But, I cannot conceive, that this caſe has the moſt remote application to the preſent. The ſurrenderor of a leaſe means to part with all that he has, and to accept an equivalent for it. Sir *Thomas Cave* did not mean to part with his eſtate, and had nothing but his own, the very thing he had before, after he had made his conveyance.

Among the modern caſes which have been cited, the caſe of Lord *Lincoln* ſtands firſt in point of authority, as a determination by a very great man, Lord *Somers*, aſſiſted by the Judges of the *King's*

(*a*) 1 *Roll. Abr.* 616. *R. pl.* 2.

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Bench, upon great conſideration, and afterwards in the dernier reſort, (for the judgment was affirmed in the Houſe of Lords) after a ſtruggle and againſt the wiſhes, as far as Judges were at liberty to entertain wiſhes, of all thoſe who concurred in the deciſion. A determination extorted from them by the ſtubborn and inexorable rules of law. The caſe, as it is ſtated in *Shower's Parliamentary Caſes*, was this: *Edward* late Earl of *Lincoln*, by his will deviſed his eſtate to go with the honours of his family, and afterwards by deeds of leaſe and releaſe of 27th and 28th *April* 1691, conveyed his whole eſtate to the reſpondents, *Davenport* and *Townſend*, and their heirs, to the uſe of him and his heirs, till his then intended marriage ſhould take effect, and after ſuch marriage had, then as to part, in truſt for his intended wife and her heirs and aſſigns for ever; and as to the reſt in truſt, to permit the ſaid Earl to receive the profits during his life, and after his deceaſe to ſell the ſame for the beſt price, and out of the money raiſed by ſale, to defray the funeral expences and pay his debts, and deliver the ſurplus (as he ſhould by his laſt will and teſtament in writing, atteſted by three witneſſes, or by another deed in writing ſo atteſted) appoint; and for want thereof to the executors and adminiſtrators of the Earl; with a proviſo that the ſaid Earl by his laſt will and teſtament, or any other deed in writing, (to be by him thereafter made and executed and atteſted as aforeſaid) might alter, change, determine, or make void all, or any of the truſts aforeſaid. And for want of ſuch after to be made will or deed, then in truſt for the ſaid Earl *Edward*, his heirs and aſſigns for ever. There is ſome perplexity in this ſtatement of the proviſo, and I think it is not to be found in the ſtatement of the caſe in *Equity Caſes Abridged*, and therefore, moſt probably, whatever it was, it was thought to have no effect upon the queſtion. Earl *Edward* died without iſſue of his body, and without the marriage taking effect. The appellant exhibited a bill to have the ſaid deeds of leaſe and releaſe ſet aſide, and to have the will executed. The prayer of the bill is probably more correctly ſtated in *Equity Caſes Abridged* to be, to have the redemption of a mortgage, and the conveyance of the eſtate; and there was a croſs bill by the co-heirs of Earl *Edward* with a prayer to the ſame effect. It ſeems to have been admitted on all ſides that at law the will was revoked; the ſtruggle was, whether upon equitable grounds the effect of the revocation at law could be avoided, and the deviſee let in to redeem as ſtanding in the place of the teſtator. In this reſpect this caſe reſembled that of *Lutwych*

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v. Mitten, upon which I have already obſerved. In a caſe ſo circumſtanced we are not to expect a very accurate examination of the grounds upon which this revocation at law was ſuppoſed to ſtand, and in this reſpect, therefore, this caſe, however ſolemnly adjudged, goes but a very little way indeed towards aſcertaining the principles upon which the revocation at law ſtood. The ground was ſtated very ſhortly indeed by thoſe who argued for the plaintiff. It was rather alluded to than ſtated that the reaſon upon which the law goes in judging it a revocation is, that the leaſe and releaſe is a conveyance of the eſtate and ſo *ex neceſſitate rei* a revocation of the deviſe.

This did very well for the occaſion when very little diſcuſſion was likely to take place, and though very looſe and incorrect in the expreſſion, was not far from being preciſe and accurate. The propoſition taken literally imports that every leaſe and releaſe is a conveyance of the eſtate, and as ſuch *ex rei neceſſitate* is a revocation. That propoſition is certainly not true, but if we underſtand the words to import, that the deeds of leaſe and releaſe in that particular caſe were ſuch a conveyance of the eſtate as *ex rei neceſſitate* would be a revocation, the propoſition is true and ſtands upon very ſolid ground, for all theſe revocations which proceed upon the ground of alteration of eſtate are *ex rei neceſſitate*, and ſtand upon no other ground whatſoever. They are implied revocations, and there is not a maxim in our law better eſtabliſhed than this, that all implications are *ex neceſſitate*; upon any other ground they would be capricious and arbitrary. When the eſtate is ſo conveyed as to undergo ſuch an alteration, that is no longer the ſame eſtate, and therefore the party does not die ſeiſed of that eſtate which he had at the time of making his will; it becomes impoſſible conſiſtent with the rules of law for the will to act upon it, and this is all that is meant when it is ſaid that *ex rei neceſſitate* the will is revoked, and ſuch was this caſe of Lord *Lincoln*. By his leaſe and releaſe, he who had the abſolute fee-ſimple in him (or what was conſidered as preciſely the ſame thing an equitable eſtate of fee-ſimple in him,) converted that abſolute fee-ſimple into a baſe fee, and if that baſe fee had happened to determine by the marriage taking effect, the whole fee-ſimple was immediately taken out of him by force of the conveyance for ever; he never could get back that fee-ſimple again which he had at the time of making his will; if he died unmarried, he died ſeiſed of a baſe fee; if he married, the whole eſtate beyond his life intereſt was taken out of him and veſted in the truſtees for the purpoſes of the ſettlement, with no uſe either declared or reſulting to himſelf. It was impoſſible he could die ſeiſed of his old eſtate; it was therefore moſt true, that *ex rei neceſſitate* theſe deeds of leaſe and releaſe were a revocation of his will. With this explanation I agree that Lord *Lincoln*'s will was revoked, and upon the authority of that caſe, as far as it goes, I argue that Sir *Thomas Cave*'s will was not revoked. *Ex rei neceſſitate* that will could not take effect; there is no ſuch neceſſity occurs in this caſe. My Lord *Lincoln* did not die ſeiſed of his old eſtate; Sir *Thomas Cave* did die ſeiſed of his old eſtate, the charges which were introduced by the ſubſequent conveyance upon it being ſuch as in no caſe could amount to more than a revocation *pro tanto*, and in this caſe did not touch the will at all. If it ſhould be ſaid that Sir *Thomas Cave*'s will reſembles that of Lord *Lincoln* in this particular, that Sir *Thomas Cave* alſo did for a time take a baſe fee by force of theſe deeds of leaſe and releaſe, I ſay that the difference between the two caſes is, that Sir *Thomas Cave*'s baſe fee determined in his life time, and he was in effect, though not according to the ſtrict letter of the law, remitted to his old fee of which he died ſeiſed, whereas Lord *Lincoln*'s baſe fee did not determine in his life time; he never did get back his old eſtate, and he died ſeiſed of that baſe fee. This is the technical difference; the ſubſtantial difference is, that the whole effect of the leaſe and releaſe in the one caſe reſpects the jointure only, whereas the inſtruments in Lord *Lincoln*'s caſe were intended to make a diſpoſition of the whole fee. My opinion, therefore, upon the preſent caſe does not in the leaſt interfere with this famous caſe of the Earl of *Lincoln*.

In the caſe of *Marwood* v. *Turner*, which I have already obſerved is in principle the ſame caſe as *Diſter* v. *Diſter*, the argument for the revocation is thus ſummed up by Mr. *Peere Williams*—"With "reſpect to the freehold eſtate, the common recovery, and the "deed by which the premiſes were conveyed to truſtees and their "heirs, declaring the uſe of the recovery to Sir *Harry Marwood* "and his heirs; theſe being all ſubſequent to the will, *and inconſiſtent therewith as declaring the premiſes ſhould go to his heirs at* "*law, and not to his deviſee*; it ſeemed to be not much oppoſed, "but that the ſame were a revocation. Beſides, a common recovery as it is a ſolemn conveyance upon record and ſtronger than "a feoffment, muſt needs be a revocation; the recovery being "ſuffered by the tenant in tail plainly gains *an abſolute fee* derived "out of that eſtate tail, and which fee was never deviſed; conſe-

"quently it muſt be even ſtronger than the caſe where a man hav-"ing lands deviſes them, and afterwards makes a feoffment of "them, though to the uſe of himſelf and his heirs, and though "this uſe be the old uſe and the old eſtate, yet according to the "ſeveral caſes in 1 *Roll's Abr*. 614. title "*Deviſes revoked*," this "is a revocation; and the caſe in 3d *Levinz* 108. *Diſter* v. *Diſter*, was "cited as in the very point, of which opinion was alſo the Lord "Chancellor." Of what opinion was the Lord Chancellor beyond the concluſion from this argument that the will was revoked I am not able to collect. The concluſion I agree to. The premiſes (beyond the ſtate of the fact) are ſome very good reaſons, and, as it appears to me, ſome very bad ones. The common recovery, and the deed to lead the uſes of it, declaring the uſes to Sir *Henry Marwood* (who ſuffered the recovery,) and his heirs, being all ſubſequent to the will and *inconſiſtent therewith*, as declaring the premiſes ſhould go to his heirs at law, and not to his deviſee, appears to me to be a very bad reaſon; they declare no ſuch thing, they are mere words of limitation. "The recovery being ſuffered "by the tenant in tail plainly gains an abſolute fee," (I will not quarrel with the words "derived out of that eſtate tail," though they are not quite correct,) "and which fee was never deviſed," is a very good reaſon, and as I take it the true reaſon of the deciſion, and that which brings it exactly within the ſcope of the caſe of *Diſter* v. *Diſter*, which was cited as in the very point, as it certainly is. When this caſe is ſtated as being a ſtronger caſe than the caſe where a man having lands deviſes them, and afterwards makes a feoffment of them, though to the uſe of himſelf and his heirs, I confeſs I cannot perceive it. In truth it is neither ſtronger nor weaker than that caſe conſidered as a caſe neither depending upon the intent or inconſiſtency with the will, or upon that much better ground that the fee which was gained was never deviſed: and conſidered as the ſame caſe it reſts merely on the authority of thoſe caſes in 1 *Roll's Abr*. 614. upon which I have already obſerved.

Several other modern caſes were cited for the Defendants as authorities applicable in their principles, or rather in the *dicta* which are ſcattered through them with great profuſion, to the preſent caſe to prove that Sir *Thomas Cave*'s will was revoked. I do not mean to controvert the deciſion in any one of them from the Earl of *Lincoln*'s caſe down to *Darley* v. *Darley*, and to the laſt caſe on the will of the late Duke of *Chandos*; but I complain of the ſtatement given in ſome of the reports of the reaſons of the judgment, which are ſometimes ſo contradictory, that not only the reaſons for one judgment oppoſe the reaſons for another judgment, but the reaſons for the ſame judgment might be miſtaken for the arguments *pro* and *con.* in the ſame caſe. That it may be ſeen whether I over-ſtate this, I will refer to two caſes determined by Lord *Hardwicke.* The firſt ſhall be one of the caſes cited in the argument; the caſe of *Sparrow* v. *Hardcaſtle*, from Mr. *Ambler's Reports.* That caſe was rightly determined. One ſeiſed as of fee in an advowſon, conveyed it to truſtees on truſts, with remainder to him and his heirs. He had the fee when he made his will: he died ſeiſed of a truſt eſtate only in remainder. This was not the ſame eſtate. Lord *Hardwicke* is reported to have ſaid upon that occaſion. "The queſtion is, Whether the "grant is a complete revocation of the deviſe of the advowſon or "not? The general principle by which caſes of this kind are go-"verned is, that at the time of the deviſe, the deviſor muſt have a "diſpoſing capacity, and an eſtate in the land deviſed; and that the "eſtate muſt remain in the ſame plight and condition to the time of "his death; *even the leaſt alteration of this intereſt by any act of his,* "*makes it a different eſtate, ſhews a different intention, and is there-*"*fore an actual revocation of ſuch will, unleſs in ſome ſpecial caſes.* "And this," ſays he, "is laid down by Lord *Trevor* in his argu-"ment in the caſe of *Arthur* v. *Bokenham, Fitzg.* 239." Theſe are very ſtrong expreſſions, but attend to the very next paſſage. "A "will is only the ſignification of a man's purpoſe how his eſtate "ſhall go after his death, *and if he does any intermediate act whence* "*it muſt neceſſarily be inferred ſuch intention did not continue,* it is a "revocation, though the owner ſhould be in, of his old uſe." He goes on to enumerate inſtances; as if one ſeiſed in fee deviſes, and then enfeoffs another to the uſe of himſelf in fee, though it is the old uſe that remains, yet it is a revocation even though no livery is made on the feoffment. So bargain and ſale without inrollment. So in Lord *Lincoln*'s caſe, where he deviſed to his heirs male and then intending to marry, he ſettles the eſtate on himſelf; he died unmarried, and the Houſe of Lords held the ſettlement to be a revocation. So if a man ſuppoſing himſelf to be ſeiſed in fee, deviſes his eſtate, and afterwards ſuſpecting he is only tenant in tail, ſuffers a common recovery, ſolely with intent to confirm his will, it is ſuch an alteration of his eſtate, as amounts to a revocation. The law is thus ſettled and it muſt not now be contradicted.

It cannot eſcape obſervation that here is a heap of heterogeneous inſtances very different in circumſtances, and depending on different principles, huddled together without diſcrimination. If we are to refer them to the two introductory paragraphs for their principle, thoſe paragraphs contradict each other. According to the firſt, even the leaſt alteration in the eſtate makes it a different eſtate, ſhews a different intention, and is therefore an actual revocation. In the other, any intermediate act whence it muſt neceſſarily be inferred that the teſtator's intention did not continue, is a revocation: this laſt is the argument on the other ſide, correcting the extravagance of the firſt propoſition. No man could mean to ſtring them together as part of a ſeries of propoſitions; they are abſolutely contradictory. In ſhort, there are here the materials of an edifice worthy of that eminent builder of legal ſyſtems Lord *Hardwicke*, but all that ſhould bind them together is left out. If the fault lies with the reporter of the caſe, I muſt ſay of him though he was a laborious and a judicious man, *brevis eſſe laboro obſcurus fio.* I muſt ſuppoſe that if we had Lord *Hardwicke*'s own words, we ſhould have had a very different ſtatement of the doctrine of revocation, from that which we are to collect from this caſe. Not that every thing which was really ſaid by Lord *Hardwicke* in this caſe of *Sparrow* v. *Hardcaſtle*, was likely to be perfectly ſatisfactory; for it is very evident if we follow him through this caſe, that he had the authority of his own great name oppoſed to the opinions which he then held. He takes notice of his opinion in *Parſons* v. *Freeman* having been cited againſt him on one point in this caſe. If that caſe of *Parſons* v. *Freeman*, as reported by Mr. *Tracy Atkyns*, bears any reſemblance to the caſe as it really paſſed, it is not in that one point only that the two caſes are oppoſed to each other. The leading principle of the caſe of *Parſons* v. *Freeman*, and which runs through the whole argument is, that a conveyance for a ſpecial purpoſe is not neceſſarily a revocation, and the caſes of eſtates for life, mortgages, *&c.* are inſtanced. This in *Sparrow* v. *Hardcaſtle* is encountered by this declaration: "I know of no ground for ſuppoſing that to be the principle upon which they" (meaning the caſe of mortgages and ſecurities conſidered as revocations) "are founded. There is no caſe which has the words *for a particular purpoſe* as a reaſon for the determination." I do not quarrel with the determinations in either of the caſes; they are both right; the uſe I make of theſe obſervations is to furniſh myſelf with an apology for abating ſomewhat of that exceſſive veneration, for ſome of the general looſe ſayings that occur in all the modern caſes concerning revocation, which ſanctifies and perpetuates error; ſo that I may be permitted to look at them ſteadily and to give to them only that weight which on examination they ſhall be found to deſerve. Lord *Hardwicke*, ſpeaking of his former opinion, ſaid, "as it is not the point in judgment, I do not think myſelf concluded by it." Where Lord *Hardwicke* was not concluded, thoſe who follow him *haud paſſibus æquis* muſt be at their liberty. I ſhall take ſome further notice of the caſe of *Parſons* v. *Freeman*, becauſe I think it opens the law of revocation, and becauſe it introduces another caſe with which I mean to cloſe this tedious diſcuſſion. That caſe is in the 3d volume of *Atkyns's Reports*, fo. 741. My brother *Heywood* informed us that my Lord *Hardwicke* in that caſe went again through this law of revocation. He did ſo; but with what uniformity are the doctrines ſtated? The abſtract of that caſe is this: On a huſband's promiſing to do acts for a wife's benefit, ſhe in articles before marriage covenanted to join in ſuffering a recovery of the eſtate, and to ſettle it to him and his heirs. The huſband made his will and deviſed this eſtate to the Defendant, but not having done what he had obliged himſelf to do, came to a new agreement with his wife that he ſhould not take her eſtate *inſtanter* in fee, but ſubject to an appointment of the huſband and wife, and in default thereof to the uſe of the huſband and his heirs. The recovery was ſuffered, and the uſes declared to the purpoſes of this deed; he died in the wife's life time without making any appointment or revoking his will. The recovery ſuffered by Mr. *Freeman* and his wife, and the declaration of the uſes of it to the uſes of the deed, was held to be a revocation of Mr. *Freeman*'s will. I will ſtate to you what my Lord *Hardwicke* is reported to have ſaid upon that occaſion. "The caſes have been determined upon very nice and artificial reaſons, upon an inclination the law always ſhews to favour an heir, and to prevent him from being diſinherited where the intention of the teſtator is *doubtful*. If the huſband had been ſeiſed of the abſolute legal eſtate at the time of making his will, and had afterwards ſuffered a recovery, and declared the uſes to be ſuch as he and his wife ſhould appoint, this would have been a revocation. If a perſon ſeiſed in fee deviſes an eſtate in fee to *J. S.*, and by a conveyance takes back an eſtate from *J. S.* in fee, that is a revocation. The caſe of a feoffment where the teſtator takes back the old uſe is a prodigious ſtrong caſe. That conſtruction muſt ariſe from a preſumed intention that the teſtator would not have made a new conveyance without an intention to revoke his will; but this muſt be underſtood with reſtrictions and limitations. If the conveyance or recovery be for a particular purpoſe, then it ſhall revoke no further than to anſwer that purpoſe, as where a teſtator creates an eſtate for years or for life in the lands deviſed, it ſhall operate no further. This is the rule of law." He then enters very largely into the queſtion whether this ſhould be conſidered as a revocation in equity, into which I ſhould not follow him, but the courſe of the argument being, that equitable and legal eſtates are revoked upon the very ſame principles, part of the argument on this head becomes material. He goes on thus: "I am of opinion that the ſame conveyance which would be a revocation of a deviſe of a legal, would be equally a revocation of a deviſe of an equitable eſtate, and it would be very dangerous to property if it was otherwiſe. But ſtill the ſame rule holds as at law; if for a particular purpoſe only, it ſhall be underſtood to be a revocation *pro tanto* only. In all the caſes where it is a conveyance of the whole eſtate in law, and is only meant for a ſecurity, the revocation ſhall only be for that particular purpoſe, to let in the incumbrance; for the teſtator himſelf has drawn the line how far the revocation ſhall go, and his intention is plainly ſhewn." Speaking of the effect of the recovery he ſays "Mr. *Freeman* took a fee differently qualified, conveyed differently, diſpoſeable differently, and it cannot be ſaid to be only for a *particular purpoſe*, and therefore I am of opinion the recovery is a revocation of the will." In this caſe, with all its inaccuracies, for it certainly is not correctly reported, Lord *Hardwicke* has gone a great way towards putting the whole doctrine of revocation, with the exception perhaps of this ſingle caſe of a feoffment where the teſtator takes back the old uſe, and even that ſtands on the authority of decided caſes on the principle of intent, upon ſolid ground. His introduction ſufficiently marks that at beſt it was a harſh doctrine. "Mr. *Freeman*," ſays he, "took a fee differently qualified, conveyed differently, diſpoſeable differently, and it cannot be ſaid to be only for a particular purpoſe, and therefore I am of opinion, the recovery is a revocation of the will." A concluſion to which I entirely agree. Lord *Hardwicke* takes notice to the doctrine, that a feoffment to the uſe of the feoffee and his heirs is a revocation: he conſiders it as an anomalous, "a prodigious ſtrong caſe" is his phraſe, and he labours to find a reaſon for it. That conſtruction, ſays he, muſt ariſe from a preſumed intention that the teſtator would not have made a new conveyance without an intention to revoke his will. If that is the ground upon which this feoffment is a revocation, the feoffment may be laid out of the caſe; for it is admitted that in this caſe the revocation does not proceed upon the ground of intent, and it is perfectly clear that Lord *Hardwicke* was of opinion, that it could have no application to a caſe like the preſent, for he goes on in the very next paragraph to ſay, that if the conveyance be for a particular purpoſe, then it ſhall revoke no further than to anſwer that purpoſe, and he puts this very caſe as an inſtance. He ſays, where a teſtator creates an eſtate for years or for life in the lands deviſed, it ſhall operate no further: and as if he meant to meet this caſe in every way in which it could be put, he takes occaſion to obſerve, that whether the conveyance be made by feoffment, by leaſe and releaſe, or by fine and recovery, it makes no alteration, for that is inſtrumental. There is a claſs of caſes in equity on the effect of a conveyance of the whole eſtate in law for particular purpoſes. The mortgage in fee is one of them. Being meant only for a ſecurity, the revocation ſhall only be for that particular purpoſe, to let in the incumbrance. But in this caſe Lord *Hardwicke* is expreſs, that this is by the ſame rule that holds at law: if for a particular purpoſe only, it ſhall be underſtood to be a revocation *pro tanto* only. The caſes are uniform, that a conveyance for a particular purpoſe can revoke no further than to anſwer that purpoſe. It remained only for my Lord *Hardwicke* to clear up the doubt, whether if the conveyance was in a form which in order to effect the particular purpoſe, required that the whole eſtate ſhould be for a moment parted with, that would revoke a will generally, when a more guarded form of conveyance would not have done it. He ſays, the conveyance is inſtrumental only. What difficulty then remains? For ſurely theſe deeds of leaſe and releaſe were only for a particular purpoſe, and for that particular purpoſe which has been repeatedly decided to be at moſt a revocation *pro tanto*. The caſe of *Lamb* v. *Parker*, 2 *Vern*. 495. is a ſtrong caſe of that ſort; ſo is *Coward* v. *Marſhall*, *Cro. Eliz.* 721. Lord *Hardwicke* ſhortly obſerves on the caſe of *Tickner* v. *Tickner*, that it was not merely to effectuate a partition, but was a new conveyance, and did not reſt upon the partition only. That caſe is ſtated by one of the Counſel. *Robert*

Tickner ſeiſed in fee of the eſtate in queſtion of gavel-kind, died inteſtate, and left two ſons *Henry* and *Robert*, who entered on his death and became ſeiſed in gavel-kind. *Robert* being poſſeſſed of an undivided moiety, made his will, and deviſed it to his wife *Elizabeth T.* and her heirs; after making his will, by a deed of partition between *Robert* and *Henry*, and by fine, all the gavel-kind eſtate which *Robert* had deviſed, was allotted entirely to *Robert* to ſuch uſes as he ſhould appoint by deed or writing, and in default of ſuch appointment to him in fee. A verdict was found in ejectment ſubject to the opinion of Lord Ch. J. *Lee*, who, after mature deliberation, held the tranſaction to be a revocation of the will. It had been ſolemnly ſettled that where *A.* and *B.* were tenants in common of lands in fee, and *A.* by will dated 25th *Jan.* 1719, deviſed his moiety in fee, and afterwards *A.* and *B.* made partition by deed dated 16th *May* 1722, and fine, declaring the uſe as to one moiety in ſeveralty to *A.* in fee, and as to the other moiety in ſeveralty to *B.* in fee, this deed of partition and fine was no revocation of the will of *A.*, and my Lord Ch. J. *Lee*, then one of the Judges of the court of *King*'s *Bench*, appears to have concurred in that determination. The caſe is to be found in a note in 3 *Peere Wms.* 169, 70. The two caſes differed in one circumſtance only, the uſe of the moiety in ſeveralty is in this caſe immediately to *A.* in fee, which was the reſulting uſe, whereas in the caſe of *Tickner* v. *Tickner*, a new uſe was interpoſed, namely, ſuch uſe as he ſhould appoint by deed or writing, and that new uſe extended to the whole fee. This was thought to be a new conveyance, and beyond the particular purpoſes of partition, which was conſiſtent with the old uſe.

Whether the caſe of *Tickner* v. *Tickner* was well or ill determined, it proceeded upon a diſtinction between that and the former caſe, and it affirmed the principle of the former caſe, which principle was certainly underſtood by Lord *Hardwicke* to be that the conveyance being a conveyance for a particular purpoſe, conſiſtent with, and not diſturbing any part of the old uſe, was no revocation at all, though the form of the conveyance being a fine and a deed to lead the uſes of it, neceſſarily in point of formal operation, diveſted the eſtate of both the tenants in common in the firſt caſe, and the heirs in gavel-kind in the laſt for a moment, in order to the veſting of the reſpective moieties in ſeveralty in thoſe who before held them undivided. It appears that at an earlier

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period (ſee, *Sid.* 90., *Keble* 357. *Freeman* 542.) this caſe of partition by conveyance, and even without conveyance had created ſome puzzle. Reaſoning from the doctrine of a feoffment to the uſe of a feoffor and his heirs being a revocation, the judges could hardly deny that, conſequently a tenant in common conveying his whole intereſt to the conuſee of a fine, in order to take it back again to himſelf and his heirs, would thereby revoke his will; in truth it ſeems a ſtronger caſe than the caſe of a feoffment to the uſe of the feoffor and his heirs, for the eſtate taken back is in ſome reſpects a different eſtate from that which was conveyed; an undivided moiety of the whole is not preciſely the ſame thing as an equivalent in part of the land to be holden in ſeveralty; but in this inſtance, fortunately common ſenſe got the better of legal ſubtleties, and it was held to be no revocation. We have not the argument of the four Judges of the *King*'s *Bench* who concurred in this opinion, but if my Lord *Hardwicke* underſtood the ground of that opinion to be that a conveyance for particular purpoſes which may ſtand with the whole or ſome part of the old uſe was not a revocation *in toto*, I ſay if Lord *Hardwicke* underſtood it ſo, we may preſume that this was the principle of the determination, and it was a ſolid principle; it had all the analogies of law to ſupport it, and it had the authority of all the caſes of partial revocations which proceed upon the ſame principle. They wiſely determined that the purpoſe of the conveyance was every thing, and the form nothing, and that there was no difference as to the point of revocation between effecting the partition by leaſe and releaſe, or fine and deed to lead the uſes of the fine, and the doing the ſame thing by matter *in pais* by metes and bounds, the way in which the Sheriff muſt have done it if he had been called upon by writ, and in which the parties were at liberty to do it without writ. The principle of this determination ought not to be confined, and in my opinion cannot be confined to that particular caſe. If the parting with the eſtate, the diveſting of the eſtate did not work a revocation in that caſe, neither ought it to work a revocation in any caſe in which the purpoſe to be effected is conſiſtent with the will, and conſiſtent with the nature and qualities of the eſtate, and leaves the whole untouched or charged only to a certain extent. This caſe ought not in my judgment to be called an excepted caſe or an anomalous caſe, it ought to be conſidered as a leading caſe, as proceeding upon a ſound principle, which principle ought to be conſidered as my Lord *Hardwicke* has conſidered it, as a wholeſome reſtriction and limitation of a doctrine which has been carried to a moſt unreaſonable extent upon the narroweſt of all grounds, reaſoning merely technical and artificial. I conſider this caſe in its principle as a caſe directly in point to the preſent, that it is impoſſible to diſtinguiſh it, and ſupported by the authority of this caſe, together with the caſe of *Parſons* v. *Freeman*, I think I have made out that the authorities in our books will be better reconciled by a judgment, declaring that this will is not revoked as to the eſtates compriſed in the deeds of leaſe and releaſe in the ſpecial verdict laſt mentioned, which I take to be the eſtates in *Swinford* and *South Kilworth*, than by the contrary declaration.

Judgment for the Defendant.

(In the *Exchequer Chamber.*)

REYNOLDS One &c. *v.* DAVIES; in Error.

Nov. 26th.

In an action on a promiſſory note by the indorſee againſt the maker, notice of the indorſement need not be averred.

ERROR from a judgment of the Court of *King's Bench*, in an action of *indebitatus aſſumpſit* by the indorſee of a promiſſory note, payable to *M. M.* or order againſt the maker. The declaration after ſtating the making of the note and the delivery thereof to the payee, proceeded to aver, that it was indorſed to the Defendant in Error by the payee, "who by the ſaid indorſement "appointed the ſaid ſum of money in the ſaid note ſpecified to be "paid to the ſaid *Francis*, (the indorſee) and then and there delivered the ſaid note, with the ſaid indorſement, ſo made thereon "as aforeſaid to the ſaid *Francis*, by reaſon whereof, and by force "of the ſtatute in that caſe made and provided, the ſaid *Martin* (the "maker) became liable to pay to the ſaid *Francis*, *&c.* and being ſo "liable, promiſed," *&c.* In the breach a requeſt to pay was ſtated to have been made on a particular day and often times afterwards. To this declaration there was a ſpecial demurrer in the *King's Bench*, ſtating ſeveral cauſes not now aſſigned as errors, and omitting the following one, which was now aſſigned on the judgment for the Plaintiff below, *viz.* "for that it is not in and by the ſaid declaration "alleged, nor does it thereby appear that any *notice* was given to "the ſaid *Martin*, or that he the ſaid *Martin* had any notice of "the ſaid indorſement of the ſaid note in the ſaid declaration, mentioned to have been made to the ſaid *Francis*, without which "notice the ſaid *Martin* was not liable by the law of this kingdom "to the payment of the money in the ſaid note mentioned to the "ſaid *Francis* as ſuch indorſee of the ſaid note."

Barrow for the Plaintiff in Error. The objection in this caſe is, that no notice of the indorſement and delivery to the indorſee is ſtated to have been given to the maker. The omiſſion of notice precludes the maker from tendering payment, ſince he cannot know to whom it is due. Where any extrinſic circumſtance creates or deſtroys a liability, the party affected is entitled to notice, *Ruſhton* v. *Aſpinall*, *Doug.* 680.; where omitting to allege notice to the indorſor, in an action againſt him, of refuſal by the acceptor to pay, was held to be error. In *Henning*'s caſe, *Cro. Jac.* 432. judgment on an *aſſumpſit* "to pay ſo much for barley as the Plaintiff ſhould have of any other," was arreſted, becauſe the Plaintiff, though he ſhewed that *J. S.* after this agreement paid a certain ſum for barley, yet did not aver that the Defendant had notice thereof. And the Court there took this difference, that if the agreement had been that Defendant ſhould pay as much as *J. S.* in particular ſhould pay, notice need not have been given, but where the perſon is altogether uncertain the Plaintiff to entitle himſelf to the action ought to give notice.

Holroyd for the Defendant in Error. Notice in this caſe is not neceſſary: but if it be, the averment of the maker's liability and promiſe to pay, being followed up by an averment of a ſpecial requeſt to pay, amounts to an allegation of notice, *Bradley* v. *Toder*, *Cro. Jac.* 228. The promiſe contained in the note being to the payee or order, the maker's liability attaches immediately on indorſement. In *Com. Dig.* Condition L. 9. it is ſaid that leſſee of a *feme ſole* is bound to take notice of her marriage, and pay his rent to the huſband. So where a leſſee covenanted to deliver poſſeſſion upon requeſt to the leſſor *his heirs or aſſigns*, and entered into a bond conditioned for the performance of his covenants, the leſſor having bargained and ſold the reverſion to *J. S.* and *T. D.*, the leſſee was, in debt on bond for not delivering the premiſes to *J. S.* and *T. D.*, held bound to take notice who were the aſſigns of the leſſor. *Hengen* v. *Payn*, *Cro. Jac.* 475. At any rate, however, the promiſe to pay in the declaration being averred to be made to the indorſee, that promiſe after judgment muſt be taken to have been an expreſs promiſe, *Atkins et Ux* v. *Hill. Cowp.* 284. *Hawkes* v. *Saunders*, *Cowp.* 289. And if this be intended, notice becomes unneceſſary.

EYRE Ch. J. No caſe preciſely in point has been cited: and therefore we are not bound by any authority to ſay, that notice is eſſential to the giſt of the action. The promiſe to pay contained in

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Reynolds *v.* Davies; in Error.

in this note is to the payee or his order: immediately then on the order being made to the indorſee the promiſe attaches. Nor can we add the qualification of notice to a promiſe which was not originally qualified with that circumſtance. The caſe of *Ruſhton* v. *Aſpinall* does not apply. There the engagement of the indorſer to the indorſee was raiſed by the law merchant, not by the poſitive promiſe of the former. In *Henning*'s caſe, the Court thought that notice was part of the undertaking, and that it was reaſonable, that the party claiming the benefit of the undertaking ſhould ſhew himſelf entitled. This is a mere queſtion of form: on which we think that as the maker's liability was not originally qualified with notice, it was not neceſſary to aver notice in the declaration.

Per Curiam, Judgment affirmed (*a*).

(*a*) Vid *Bayley on Bills*, 108. where it is ſaid to be unneceſſary to aver notice of indorſement, and an anonymous caſe from *Pract. Reg.* 358. is cited to that effect.

END OF MICHAELMAS TERM.

1796.

CASES

ARGUED and DETERMINED
IN THE
Court of COMMON PLEAS
IN
Hilary Term,

In the Thirty-ſeventh Year of the Reign of GEORGE III.

TAGG *v.* MADAN.

Jan. 27th.

If an attorney ſue as a common perſon, the Court will give the defendant leave to plead that the cauſe of action aroſe within the juriſdiction of the court of requeſts, together with other matters.

THE Plaintiff who was an attorney, having ſued as a common perſon to recover the amount of his bill from the Defendant: the latter moved for leave to plead ſeveral matters, *viz. Non aſſumpſit*, and that the cauſe of action aroſe within the juriſdiction of the Court of Requeſts:

Le Blanc Serjt. oppoſed the 2d plea, ſaying that as the Plaintiff was an attorney, he was entitled to ſue in this Court. (*a*)

Shepherd Serjt. *contrà* inſiſted that the Plaintiff had waved his privilege by ſuing as a common perſon, and could not now therefore ſet it up: *Jones* v. *Bodeenor*, 1 *Ld. Raym.* 136. and *Croſsley* v. *Shaw*, 2 *Bl.* 1088. where *De Grey* Ch. J. ſays, "an attorney "may wave his privilege either when Plaintiff by ſuing as a com-"mon perſon, as in the caſe now at bar, or when Defendant "by not claiming it in a proper time or in a proper manner (*b*)."

Per Curiam, We cannot know from this record that the Plaintiff is an attorney.

Rule abſolute.

(*a*) Vid. *Gardner* v. *Jeſſop*, *One*, *&c.* 2 *Wilſ.* 42. *Silk* v. *Rennett*, *un*, *&c.* 3 *Bur.* 1583. *Contra*, *Wiltſhire* v. *Lloyd*, *Doug.* 381. where *Silk* v. *Rennett* was overruled, and *Huſſey & Another* v. *Jordan*, *B. R. Trin.* 25 *Geo.* III. *Doug* 382. in the notes to the ſame effect.

(*b*) Vid. alſo *Hetherington*, *un*, *&c.* v. *Lowth*, 2 *Str.* 837. and *Welland* v. *Frament*, *Barnes* 479. *ed.* 3.

Feb. 3d.

CHEETHAM and Others, Executors, *v.* JAMES WARD.

If the obligee in a joint and ſeveral bond, make one of two obligors his executor, with others, the action on the bond is diſcharged as to both obligors.

DEBT on bond brought by *John Cheetham*, *James Grugeon*, *Thomas Fenner*, and *William Ward*, executors of *Abraham Cheetham*, againſt the Defendant. On oyer craved it appeared to be a joint and ſeveral bond given by *William Ward* (one of the Plaintiffs) and *James Ward* (the Defendant) to *Abraham Cheetham* (the teſtator) in the penal ſum of 1600*l.* conditioned for the payment of 800*l.* by the obligors, on the 24th day of *December* then next enſuing. The Defendant pleaded "That the ſaid *William Ward* " mentioned in the ſaid writing obligatory and in the condition " thereof is the ſaid *William Ward* one of the now Plaintiffs, and " not another or different perſon; and that after the making of the " ſaid writing obligatory, and after the ſaid 24th day of *December* " next enſuing the date of the ſaid writing obligatory, and in the " condition thereof mentioned to wit on &c. at &c. the ſaid " *Abraham Cheetham* in the ſaid writing obligatory, and the con" dition thereof mentioned, duly made his laſt will and teſtament in " writing, and thereby nominated and appointed the ſaid *J. C.* " *J. G. T. F.* and *William Ward* executors thereof, and afterwards " to wit on &c. at &c. died without altering or revoking his ſaid will, " and that after the death of the ſaid *Abraham*, to wit on &c. at &c. " the ſaid *J. C. J. G. T. F.* and *William Ward* duly proved the " ſaid laſt will and teſtament of the ſaid *Abraham*, and took upon " themſelves the burthen of the (*a*) execution thereof, and that

" by

(*a*) When the obligee makes his obligor his executor, the latter is thereby diſcharged from any action on the bond, whether he adminiſter or not. 20 *Ed.* 4. 17. 21 *Ed.* 4. 3. *b. Plowd.* 184. and agreed by all the Judges in *Wankford* v. *Wankford*, 1 *Salk.* 299. Whether an actual refuſal to accept the executorſhip will prevent the diſcharge from taking effect or not, ſeems a nice point. In *Hargrave* and *Butler*'s valuable edition of *Co. Lit.* 264. *b.* note 1. the latter gentleman lays it down that the debt is diſcharged, " whether the executor accepts or refuſes the executorſhip." This doctrine is indeed ſupported by the opinion of *Twyſden* J. in *Abram* v. *Cunningham*, 1 *Vent.* 303. But three of the Judges in *Wankford* v. *Wankford*, (where *Twyſden*'s opinion was mentioned,) held the contrary to be law; *Powell* J. declining to give a decided opinion on the point. In that caſe alſo *Holt* Ch. J. made this diſtinction, that where the obligor is appointed ſole executor to his obligee, and refuſes the executorſhip, there his debt is not diſcharged, but where he is appointed executor with others and refuſes, if his co-executors act, his debt is diſcharged; and he gives as a reaſon for this diſtinction, that his refuſal in the latter caſe is void, and cites Lord *Petre*'s caſe, 1 *Salk.* 311. This reaſon is a ſtrong corroboration of the notion that a refuſal to accept the executorſhip does prevent the diſcharge from

taking

"by reaſon of the premiſes the ſaid debt in the ſaid writing obligatory mentioned then and there became wholly extinguiſhed in law, and the ſaid *James* and *William Ward*, then and there became and were, and ſtill are, and each of them is wholly acquitted and diſcharged from the payment thereof, *to wit*, at, *&c.* and this, *&c.* wherefore, *&c.*"

To this plea there was a general demurrer and joinder.

Shepherd Serjt. in ſupport of the demurrer. The queſtion on this record is, whether the obligee in a joint and ſeveral bond by, making one of the obligors his executor extinguiſhes the debt? I admit that when the bond is joint only, and the debt is extinguiſhed as to one co-obligor it is extinguiſhed as to the other: and alſo that if it be joint and ſeveral, and a releaſe is executed to one, it will operate as a releaſe to both. But the releaſe in this caſe is not by deed, but by operation of law: for though the obligee made the obligor his executor, it is the law which makes that act operate as a releaſe. Now in *Co. Litt.* 264. *b.* where the diverſity between a releaſe in deed and a releaſe in law is treated of, it is ſaid "a releaſe in law ſhall be expounded more favourable according to the intent and meaning of the parties than a releaſe in deed, which is the act of the party, and ſhall be taken moſt ſtrongly againſt himſelf." Where the obligee makes a co-obligor his executor, it is improper to ſay, that the debt of the latter is thereby releaſed; for if it were, not only the action, but the debt would be extinguiſhed. But that is not the caſe: for the co-obligor will be debtor to himſelf as executor for the benefit of the creditors and legatees, and the debt will be aſſets in his hands. *Dorcheſter* v. *Webb*, *Cro. Car.* 373. *Wankford* v. *Wankford*, 1 *Salk.* 303. *Brown* v. *Selwin*, *Caſ. temp. Talb.* 240. 4 *Brown Parl. Rep.* 179. *Carey* v. *Goodinge*, 3 *Brown Chan. Rep.* 110. (*a*) The action is only gone becauſe the debtor

(*a*) See alſo note (1) in *Hargrave* and *Butler's Co. Litt.* 264. *b.*

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taking effect; for where the refuſal is valid, there the releaſe is ineffectual, and *è contrà*. It ſeems doubtful, therefore, whether the averment of the Defendant on this record, that *W. Ward took upon himſelf the burthen of the execution* was neceſſary. Where indeed the obligor makes his obligee his executor, the action of the latter is only diſcharged by his accepting the executorſhip: and there ſuch an averment would be neceſſary. 20 *Ed.* 4. 17. 21. *Ed.* 4. 3. *b.* *Bro. Ab. Executor* 114. *Plowd.* 184. *b.* Sir *W. Jones* 345. *Wentworth's Office of Executor*, *c.* 2. *ſ.* 5. *Rawlinſon* v. *Shaw*, 3 *Term Rep.* 557. In this latter caſe it would alſo be neceſſary to aver that aſſets of the obligor to the amount of the debt came to the hands of the obligee, for without that circumſtance it appears that his debt is not extinguiſhed. *Per Holt* Ch. J. and *Powell* J. 1 *Salk*, 304, 305. and *Cock* v. *Croſs*, 2 *Lev.* 73.

cannot maintain an action againſt himſelf. But though *William Ward*, in his perſonal character is unable to ſue, the Defendant being a co-obligor he may be able to ſue him in his official character. *William Ward* as executor of *Cheetham*, may declare againſt the Defendant, though he cannot indeed declare againſt himſelf. Had the bond been only joint, both the obligors muſt have been made Defendants in the action, which would have prevented *William Ward* as executor from ſuing: but the bond being ſeveral he may well join himſelf with the other executors as a co-plaintiff in this action againſt one of the obligors. In the caſe of *Dorcheſter* v. *Webb*, the executrix of one of the co-obligors of a bond, having alſo become executrix to the obligee, was permitted in her latter character to maintain an action againſt the ſurviving co-obligor. [ROOKE J. cited *Hammon* v. *Roll*, *March* 202. where *A.* and *B.* being bound jointly and ſeverally to *C.* and *C.* having releaſed *A.*, it was held that *B.* alſo was diſcharged.] Probably the releaſe in the caſe of *Hammon* v. *Roll* was by deed, and was therefore to be taken moſt ſtrongly againſt the releaſor; whereas in the preſent caſe there is only a *quaſi* releaſe, and it has been ſo called becauſe it ſuſpends the action. *Cro. Car.* 373.

Le Blanc Serjt. *contrà.* This point has been already expreſsly decided in very old times. The caſe in 21 *Ed.* 4. 81 *b.* (*a*) alſo abridged *Bro. Ab. Executors*, *pl.* 118. is precisely the ſame as this, and in favour of the Defendant's plea. It has alſo been eſtabliſhed by other caſes that a releaſe of one co-obligor by operation of law, is a releaſe of the others (*b*). Thus in 21 *H.* 7, 30. it was laid down that if two be bound to a *feme ſole*, and ſhe take one of them to huſband, who dies, ſhe ſhall not have an action againſt the other,

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(*a*) The caſe tranſlated is as follows: "*Note*, that *Copley*, prothonotary, aſked of "*Brian* (Chief Juſtice), if three be bound "to a man in an obligation jointly and "ſeverally, and the obligee make one of "the obligors his executor and die, whether he who is made executor ſhall have "an action againſt any of the others? And "BRIAN ſaid that he ſhould not, for if one "was diſcharged, all ſhall be diſcharged; "becauſe the making one of them executor is as perfect a diſcharge in law, as "if he had releaſed to one in deed. *Copley.* "Sir, the obligation is ſeveral. BRIAN. "This does not matter; for a recovery "againſt one of them and execution ſued, "will be a diſcharge to the others. And "ſo of a diſcharge made to one of them, "*&c.*" This caſe is recognized by *Gould* J. in *Wankford* v. *Wankford*, 1 *Salk* 300.

(*b*) In 21 *H.* 7. 29. *b.* it was held, that if *A.* have a right of action againſt *B.* and *C.* jointly, and *A.* and *B.* ſubmit all treſpaſſes and actions, *&c.* to the award of arbitrators; by the award the right of action which *A.* has againſt *C.* will be diſcharged alſo. And in *Wentworth's Office of Executor*, *c.* 2. *ſ.* 4. it is ſaid, that if teſtator make his debtor and others his executors the debt is releaſed; for they muſt all join in a ſuit. *Vide etiam Hargrave* and *Butler's Co. Lit.* 232. *a.* note (1.) for a manuſcript note of Lord *Nottingham* on this ſubject.

other, for the duty and debt were extinguiſhed. This laſt caſe was cited and recognized in Sir *John Nedham*'s caſe, 8 *Co.* 136. 3d reſolution, where it was held, that the committing of adminiſtration does not extinguiſh the debt, but that if the obligee make the obligor his executor, it is a releaſe in law of the debt, becauſe it is the act of the obligee himſelf. With reſpect to *Dorcheſter* v. *Webb*, the 2d reſolution there, as reported in Sir *W. Jones* 345. ſhews, that where the obligee makes the obligor executor, the debt of the latter is abſolutely diſcharged, for the reaſon given is, that an action perſonal, once ſuſpended by the act of the party, is gone for ever. The 3d reſolution of the ſame caſe is, "if the obligee "make one of the obligors executor who adminiſters, in this caſe "the obligor cannot ſue the other obligor although he ſurvive, and "although the bond was joint and ſeveral." Indeed from the 4th reſolution of that caſe, it alſo appears, that the only ground of the deciſion in favour of the Plaintiff was, that ſhe was executor of the co-obligor, and not the co-obligor herſelf. In *Wankford* v. *Wankford* it was ſaid by *Powell* J. that a perſonal action once ſuſpended by the act of the party is gone for ever, and though in ſome caſes it may be ſuſpended and revive again, yet never where that ſuſpenſion ariſes from the act of the party.

Eyre Ch. J. Having heard the argument in ſupport of this plea, I am ſatisfied that this caſe may be decided in favour of the Defendant on the principle now acknowledged, that where a perſonal action is once ſuſpended by the voluntary act of the party entitled to it, it is for ever gone and diſcharged (*a*). This was admitted to be the caſe where there is but one obligor in a bond. But a diſtinction was attempted between the caſe of a ſingle obligor, and that of two who have become bound jointly and ſeverally. The very point in iſſue was however decided in the year book: and *Brian* there gives a ſatisfactory reaſon for the deciſion. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a diſcharge of one, or ſatisfaction made by one is a diſcharge of both. This puts an end to the argument that the action is not neceſſarily ſuſpended as to both: for it is the effect of the ſuſpenſion as to one that releaſes, diſcharges, and extinguiſhes the action as to both. This caſe, therefore, muſt be decided by the year-book, and the principle there laid down,

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(*a*) 20 *Ed.* 4. 17. 21. *Ed.* 4. 3. *b. Dy.* 140. *Hob.* 10. *Cro. Eliz.* 150. *Cro. Car.* 373. and Sir *W. Jones.* 345.

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which has never been doubted ſince, whether founded in reaſon or not.

Heath J. I am of the ſame opinion. It is of no conſequence whether the releaſe be by operation of law, or by deed demonſtrating the intent of the party. For when the obligee actually releaſes to one as matter of favour, that releaſe affects both.

Rooke J. The general principle that if the action be once ſuſpended in the caſe of a ſingle obligor, it is gone for ever, is not now diſputed: and the caſe in the year-book ſhews, that if the action be gone as to one obligor where two have become bound, it is gone as to both. Now the obligee has it not in his power to elect to diſcharge one obligor without diſcharging the other.

Judgment for the Defendant.

Feb. 6th.

Curling and Others *v.* Long and Others.

A ſhip bound for *London* after taking in her cargo, but before breaking ground was cut out of her port of lading in *Jamaica* by a *French* privateer, but was afterwards re-captured and carried into another port in the ſame iſland, where the cargo was ſold by order of the Court of Admiralty for the benefit of the freighters: Held that the owners of the ſhip were not intitled to any part of the freight. Though by the uſage of the trade the ſhip was loaded at their expence.

Assumpsit for freight claimed under the following circumſtances. The Plaintiffs were owners of the ſhip *The Earl of Effingham*, and the Defendants the conſignees of nine hogſheads of ſugar ſhipped on board her while lying in *Salt River*, *Jamaica*, and bound for *London*. The goods were put on board on the 18th of *September* 1795, and four ſeveral bills of lading were duly ſigned by the captain. On the 2d of *December* following, having completed her lading, the ſhip cleared out for her voyage. On the 31ſt of *December*, while waiting for convoy, ſhe was cut out of the river by two *French* privateers, and carried out to ſea, but was re-captured on the ſame day by a *Britiſh* ſchooner, and carried into *Port Royal*. The ſhip was afterwards libelled in the Admiralty Court of *Jamaica*, and appraiſed and ſold under an order of that court. The proceeds of the ſale after deducting one-eighth for ſalvage, were remitted to the Defendants as agents for the ſeveral owners of goods on board. The whole of the cargo, including the goods in queſtion, was brought to the ſhip in *Salt River* for the purpoſe of being loaded, and was actually put on board at the expence of the Plaintiffs as owners of the ſhip according to the uſage of the *Jamaica* trade. This amounted to 310*l.* The Plaintiffs alſo expended 455*l.* 18*s.* according to the ſame uſage, for the proviſions and wages of the crew, between the time when the ſhip began to take in her loading, and the time of the capture. The Plaintiffs' demand was ſhaped in different ways ſo as to recover a proportion of the freight either from the 1ſt of *Sep-*

tember 1795, when the goods were put on board to the 1ſt of *January* 1796, when the ſhip was re-captured, or from the 2d of *December* 1795, the day the goods were ſhipped, to the 1ſt of *January* 1796, the day ſhe was re-captured; or to recover a proportion of the ſums expended by the Plaintiffs as above-mentioned.

The cauſe was tried before *Eyre* Ch. J. at the *Guildhall* ſittings after *Michaelmas* Term 1796, who directed a non-ſuit.

A rule *Niſi* for ſetting aſide this non-ſuit, and entering a verdict for the Plaintiffs having been obtained on a former day,

Adair and *Heywood* Serjts. now ſhewed cauſe and contended that no freight could be claimed, there having been no inception of the voyage, which does not commence from the loading but from the time of breaking ground; that although no expreſs caſe was to be found upon this ſubject, yet that ſeveral paſſages in *Molloy* afforded a ſtrong implication in ſupport of this poſition, as *Lib* 2. *c.* 4. *ſ.* 3. "By the law marine chance or ſome other notorious "neceſſity will excuſe the maſter, but then he loſeth his freight "till ſuch time as he *breaks ground*, and till then he ſuſtains the "loſs of the ſhip;" ſo *ſ.* 5. "if goods are fully loaded aboard, "and the ſhip hath *broke ground*, the merchant on conſideration "afterwards reſolves not on the adventure but will unlade again, "by the law marine the freight is due;" and in *ſ.* 6. it is ſaid, that if the party agree to ſail with the firſt wind and opportunity, "the "ſhip departs not with the firſt wind and opportunity, yet after"wards *breaks ground* and arrives at her port, the freight in this "caſe is become due, for there is nothing can bar the ſhip of her "freight, but the not departure." They obſerved that with reſpect to the caſe of *Luke* v. *Lyde*, 2 *Bur*. 882. the proportion of freight there allowed was calculated from the day of ſailing, and that Lord *Mansfield* explained "a rateable freight" to mean *pro ratâ itineris;* and that as here there was no "*iter*," ſo there could be no freight; that as to the uſage of the *Jamaica* trade, ſince all the expences incurred by the Plaintiffs were to be covered by the freight, the Plaintiffs could have no demand where no freight was due.

Le Blanc and *Shepherd* Serjts. in ſupport of the rule, argued that in a contract where part of the conſideration is performed, the party is intitled to a remuneration for ſuch part-performance, and that in *Molloy* the freight only and not the loading was conſidered; that the right to freight *pro ratâ itineris* depends on the circum-

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ſtance of the *incboate* right having commenced or not, and that this circumſtance depends on the inception of the contract. They referred to the caſe of *Tonge* v. *Watts*, 2 *Str.* 1251. where *Lee* Ch. J. non-ſuited the Plaintiff in an action on an inſurance for freight becauſe "the goods were not *actually on board* ſo as to "make the Plaintiff's right to freight commence," and to the obſervations of *Ld. Kenyon* upon that and the caſe of *Montgomery* and *Egginton*, 3 *Term Rep.* 362. in the courſe of his judgment in *Thompſon* v. *Taylor*, 6. *Term. Rep.* 481, 2.

Eyre Ch. J. This is a caſe of the very firſt impreſſion; and it appears to me that the demand of the Plaintiffs is neither warranted by the marine or by the common law. The former has ſettled what freight is, what ſervices it includes, and alſo that it is diviſible, which is contrary to the principles of the common law. At common law all the expences of loading are included in the freight, and if the party be not intitled to freight he can demand no ſatisfaction for loading. The inception of freight is breaking ground (*a*). In the law of inſurance, indeed, this doctrine is not holden ſo ſtrict, for there if the goods be ſo ſituated as to create a well-grounded expectation of freight being raiſed, it is decided that the freight is inſurable, and recoverable. But that does not affect the marine law as to freight in caſes between the ſhip-owners and freighters, by which this caſe muſt be decided. According to that law no right to freight commences till the ſhip has broken ground; here the ſhip had not broken ground, having been captured in the river. The ſituation of the places where cargoes are taken in materially varies the labour, coſt, and pains taken by the ſhipper and maſter. In ſome places there is little difficulty and expence, in others a great deal. On theſe circumſtances, depends the price of freight; if the maſter incurs this coſt and trouble he takes a larger freight, if the ſhipper, a ſmaller. In either caſe the freight is his reward. If therefore by the marine law he be intitled to no freight, he can claim no remuneration. So ſtands the caſe by the marine law. Let us now view it upon the principles of the common law. The contract was to load theſe goods on board and bring them to *England* for a certain price. Upon this contract, how could a declaration be framed for the Plaintiffs' demand either in

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(*a*) Though "breaking ground" be the uſual inception of freight, yet an exception to this general rule has been ſtated by a writer of ſome authority; "In caſe a "ſhip is freighted out, and in conſequence "of the agreement, receives her lading "aboard, if an embargo happens afterwards and her cargo is taken as forfeited, "yet the owners ſhall notwithſtanding receive the freight, as the fault was not in "them, but in him whoſe property the "goods were." *Beawes Lex. Merc.* 87. and with this agrees the civil law. *Dig. Lib.* 19. tit. 2. *c.* 61.

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aſſumpſit (*b*), or in an action on a charter party (*c*)? Could the Plaintiffs ſtate a part-performance of the contract and inſiſt on payment for it? This could not be done, for by the law of *England* the contract is intire and indiviſible. By the marine law, indeed, parties may recover *pro. ratâ*, if the voyage be interrupted. And by the common law where a contract *cannot* be performed ſuch a meritorious conſideration may ariſe as will ſometimes intitle a party to recover in the form of an action of *aſſumpſit* for work and labour even after the contract has been broken. Such is the caſe where a ſhip after capture and re-capture completes her voyage; for there the ſhipper has his goods with the advantage of carriage, and upon that though the original contract be gone, a meritorious conſideration ariſes which intitles the maſter to a recompence; not, however, on the foot of the old contract, but on a new contract which ſprings out of it. Here the ſhip never arrived at the port of deſtination, but put into a port in *Jamaica*, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the ſmalleſt degree by the expences incurred. I am therefore of opinion, that neither by the marine, or the common law, are theſe Plaintiffs, however unfortunate, entitled to recover.

HEATH J. This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ſhip's breaking ground, and is conſummated upon her arrival at the port of deſtination. If the voyage be interrupted the party may claim *pro ratâ*. Freight commences at the ſame time in all parts, ſince it depends on the ſame principle here and at *Jamaica*. It is true, indeed, that by the cuſtoms of different ports, duties more or leſs onerous, may be impoſed on the maſter, and recompenſed by the freight. But that does not vary the principle. This caſe is only new in its circumſtances. The law of inſurance does not apply to this caſe: for the mere hope or expectation of intereſt is ſufficient to intitle the aſſured in a policy of inſurance to recover againſt the underwriters (*c*).

(*a*) This agrees with the doctrine laid down in *Cutter* v. *Powell*, 6 *Term Rep.* 320. where a ſailor having taken a promiſſory note for a certain ſum from his employer on condition of performing the voyage, died before the arrival of the ſhip. There the Court held, that no wages could be claimed either by virtue of the contract or upon a *quantum meruit*.

(*b*) If one covenant for ſuch a ſum to carry goods to ſuch a place, and being prevented by the act of God from delivering them at that place, deliver them elſewhere and they are accepted, yet he cannot recover upon the covenant *pro ratâ*. *Cook* v. *Jennings*, 7 *Term Rep.* 381.

(*c*) To this effect ſee *Le Cras* v. *Hughes*, *Park Inſur.* 269. *Crawfurd* v. *Hunter*, 8 *Term Rep.* 13. & *Boehm and Others* v. *Bell*, 8 *Term Rep.* 154.

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ROOKE J. This is a new caſe, and therefore I take the demand not to be founded on the uſage of trade. The contract in a bill of lading is for freight. The expreſſion is, "they paying freight;" and though the maſter may have been at the expence of loading, and the freight was higher on that account, yet as it had not commenced, the Plaintiffs cannot demand a recompence. The text writers all agree that freight commences from the breaking ground. This is clear and intelligible: the ſhip begins to earn when ſhe begins to move; and we cannot introduce new principles. The writers alſo ſay, that there may be caſes where the ſhip-owners may be intitled to a proportion of what the ſhip has earned; but that cannot include what has been earned by the maſter before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the ſailing of the ſhip. Did the freight commence ſooner, it might induce the maſter to ſtay a a longer time in port and ſo delay the voyage. Inſurance is a contract of indemnity; the caſes, therefore, which are founded on ſuch a contract are not applicable to this caſe. Upon theſe grounds I think the non-ſuit right.

Rule diſcharged.

HOLMES and Another *v.* RHODES.

Feb. 8th.

Non damnificatus cannot be pleaded to debt on bond, conditioned for the payment of a ſum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity.

DEBT on bond; and the common counts in debt.

The Defendant craved oyer of the bond, which was a joint and ſeveral bond of the Defendant and one *T. R.* for the payment of the penal ſum of 600 *l.* to the Plaintiffs and one *W. H* ſince deceaſed; and alſo of the condition, which was as follows: "Whereas "the above-named Plaintiffs and *W. H.*, at the ſpecial inſtance and "requeſt and for the only proper debt of the above-bound de-"fendant and *T. R.* in and by one bond or obligation bearing date "&c. became jointly and ſeverally bound together with the ſaid "Defendant and *T. R.* unto *R. Wright*, of *&c.* in the penal ſum "of 600 *l.* with a condition there-under written that if the ſaid "Plaintiffs and *W. H.* and the Defendant and *T. R.* or ſome or one of "them their or ſome or one of their heirs executors or adminiſtra-"tors ſhould and did well and truly pay or cauſe to be paid to "*R. Wright* 300 *l.* with lawful intereſt for the ſame in manner "following that is to ſay 100 *l.* on the 10th of *January* 1788 with

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"lawful intereſt on 300*l.*, 100*l.* on the 10th of *January* 1789 "with lawful intereſt on 200*l.*, and the remaining 100*l.* on the "10th of *January* 1790 with lawful intereſt on the ſame, then the "ſaid obligation to be void: Now the condition of the above-"written obligation is ſuch, that if the ſaid Defendant and *T. R.* "or one of them their or one of their heirs executors or admi-"niſtrators do and ſhall well and truly pay or cauſe to be paid to "the ſaid *R. Wright* his executors adminiſtrators or aſſigns the ſaid "ſum of 300*l.* and the intereſt thereof on the days and times and "in the manner limited and appointed in and by the condition "of the ſaid in part recited obligation and according to the true "intent and meaning thereof, and *thereby* acquit releaſe and diſ-"charge the ſaid Plaintiffs and *W. H.* their and each and every of "their heirs executors and adminiſtrators goods and chattels lands "and tenements of and from the ſaid recited obligation and all "ſum and ſums of money therein and in the condition thereof "mentioned and thereupon to grow due for the ſame, and alſo of "and from all actions ſuits payments coſts charges damages and "expences which may ariſe happen or accrue to them the ſaid "Plaintiffs and *W. H.* their or any of their heirs executors admi-"niſtrators or aſſigns for or by reaſon of their becoming bound "with the ſaid Defendant and *T. R.* to the ſaid *R. Wright*, as "aforeſaid then the above-written obligation to be void otherwiſe to "be and remain in full force and virtue." The Defendant then pleaded to the firſt count "that the ſaid Plaintiffs have not nor "hath either of them at any time ſince the making of the ſaid "recited writing obligatory and condition thereof hitherto been "in anywiſe damnified by reaſon or means of the ſaid re-"cited writing obligatory or the ſaid condition thereof. And "this &c. wherefore" &c. To the other counts he pleaded *nil debet* and a ſet off.

The Plaintiffs replied, that they were damnified in conſequence of having been obliged to pay the ſum of money for which they had become jointly bound with the Defendant and *T. R.*, and alſo the coſts of a certain action for the recovery of the ſame brought againſt them by the executors of *R. Wright.*

To this replication there was a ſpecial demurrer, and joinder.

Williams Serjt. firſt argued in ſupport of the demurrer; but as the Court gave no opinion upon the replication, the cauſes of demurrer and argument thereon are here omitted. He then contended that the bond on which the Plaintiffs had declared being in ſubſtance an indemnity bond, though not preciſely expreſſed to be ſo in the condition, the plea of *non damnificatus* was therefore proper. He obſerved that the Defendant's bond was conditioned for the payment of the principal and intereſt, for which the Plaintiffs had engaged themſelves, and *thereby* to acquit, releaſe, and diſcharge them; that the object of the condition was indemnification, and that the having pointed out the mode by which the indemnification was to be made would not alter the nature of the condition.

Shepherd Serjt. was to have argued on the other ſide;

But *the Court* were of opinion, that the plea of *non damnificatus* was no anſwer to that part of the condition by which the Defendant undertook to pay the ſum for which the Plaintiffs bound themſelves (*a*), and was therefore bad.

Judgment for the Plaintiffs (*b*).

(*a*) It ſeems, however, that *non damnificatus* would not have been a good plea in this caſe, even if the condition had not been for payment of a ſum of money. For in a note to *Cutler* v. *Southern*, 1 *Saund.* 116. by Mr. Serjt. *Williams*, this diſtinction is taken. Where the condition is to *diſcharge or acquit* the Plaintiff from ſuch a bond or other particular thing, the Defendant muſt ſet forth affirmatively the ſpecial matter of performance: but when the condition is to diſcharge and acquit Plaintiff *from any damage* by reaſon of ſuch bond or other particular thing, then *non damnificatus* is a good plea. See the authorities there cited.

(*b*) Analagous to this caſe in principle are thoſe deciſions where it has been holden, that if a bond be conditioned for the payment of a ſum of money at a certain day, though really given by way of indemnity, the debt accrues from the day mentioned in the condition, and does not await the damnification. *Touiſſant* v. *Martinnant*, 2 *Term Rep.* 100. *Martin* v. *Court*, 2 *Term Rep.* 640. and *Hodgſon and Others* v. *Bell*, 7 *Term Rep.* 97.—Nothing *dehors* the bond can be pleaded to ſhew that it is an indemnity bond. *Meaſe* v. *Meaſe*, *Cowp.* 47.

Feb. 10th.

SHUM and Others *v.* FARRINGTON.

Debt on bond conditioned for *J. S.* rendering account to the Plaintiffs of all monies which he ſhould receive as their agent. Defendant pleads performance in the words of the condition. Plaintiffs reply that *J. S.* received divers ſums of money amounting to 2000*l.* belonging and relating to the Plaintiffs' buſineſs as their agent, and hath not rendered to the Plaintiffs an account of the ſaid 2000*l.* or any part thereof. This replication being ſpecially demurred to for generality, was held ſufficient.

DEBT on bond for 2000*l.*

Upon oyer craved it appeared that the Defendant and one *Robert Spratlin*, the elder, became jointly and ſeverally bound to the Plaintiffs, as brewers and copartners, in the above ſum, conditioned for the good behaviour of *Robert Spratlin*, the younger, employed by the Plaintiffs as their agent or factor in their buſineſs as brewers, and for his duly rendering and paying to the Plaintiffs a true and juſt and fair account payment and delivery of all monies, bills, &c. belonging or relating to their trade as ſuch agent or factor, wherewith he ſhould be entruſted or which he ſhould receive or be concerned in as agent for the Plaintiffs. The Defendant pleaded that *Robert Spratlin*, the younger, was employed as the Plaintiffs' agent at *Colcheſter*, and averred performance in the words of the condition.

Replication, That " the ſaid *Robert Spratlin* the younger " whilſt he ſo continued to manage and conduct the ſaid buſineſs " of the Plaintiffs as their agent or factor to wit on the 30th of " *October* 1793 and on divers other days and times between that " day and the 1ſt of *July* 1796 at the town of *Colcheſter* aforeſaid under and by virtue of the ſaid appointment received divers " ſums of money amounting to a large ſum of money to wit the " ſum of 2000 *l.* belonging and relating to the ſaid trade and buſineſs as ſuch agent or factor as aforeſaid, and hath not given " rendered, and paid unto the Plaintiffs or either of them a true " juſt and fair account payment and delivery of the ſaid ſum of " 2000*l.* or any part thereof but then and there wholly refuſed " and neglected ſo to do contrary to the form and effect of the " ſaid condition And this *&c.* Wherefore" *&c.*

To this the Defendant demurred ſpecially " for that it does not " appear in and by the ſaid replication of the Plaintiffs from whom " or in what manner, or in what proportions the ſaid ſums of " money in the ſaid replication mentioned amounting to the ſaid " ſum of 2000 *l.* in the ſaid replication mentioned were received " by the ſaid *Robert Spratlin* the younger."

Joinder in demurrer.

Le Blanc Serjt. in ſupport of the demurrer. This demurrer is drawn on the authority of *Jones* v. *Williams and another*, *Doug.* 215. One cauſe of demurrer there was, that it was not ſhewn from whom the money was received; and according to my note of that caſe, when it was inſiſted upon in argument that it was not neceſſary to particularize the receipt, Lord *Mansfield* ſaid, that it clearly was neceſſary, and mentioned the 8 & 9 *Will* 3. *c.* 11. This caſe is ſtronger than that in *Douglas*, for there the embezzlement was charged as having been committed on one day, whereas here a ſpace of three years is comprehended, and *divers* ſums are laid as having come to *R. Spratlin*'s hands without ſhewing whence they came. This allegation is ſo general that the Plaintiffs may prove the receipts in any way they pleaſe, and the Defendant cannot know what evidence it will be neceſſary for him to produce in order to meet the charge. The caſe of *French* v. *Pearce*, 1 *Lev.* 94. (cited by Mr. J. *Heath*) where a general replication of this kind was held good, is open to two obſervations, firſt, that it is not the note of *Levinz* himſelf who was ill during the whole Term in which it was decided; ſecondly, that the Court ſaid that ſuch a replication was well enough in debt on bond where on any breach the penalty and not the damages, was to be recovered, but that it would be otherwiſe in covenant (*a*), where the recompence is in damages. Now ſince the 8 & 9 *Will.* 3. *c.* 11. *ſ.* 8. the Plaintiff in debt on bond can only obtain damages for ſuch breaches as he aſſigns (*b*): debt on bond and covenant therefore now ſtand upon the ſame footing in this reſpect, and this probably was Lord *Mansfield*'s reaſon for alluding to the 8 & 9 *Will.* 3. according to my note of *Jones* v. *Williams.* The Plaintiffs ſhould have ſpecified the nature of the receipt: as whether the money was received of them, or their cuſtomers: had they alledged that *R. Spratlin* received ſo much in the retail way, that would have been ſufficient to inform the Defendant what charge he had to meet. The parties cannot go to iſſue on the general plea of performance, *Sayre* v. *Minns*, *Cowp.* 578. and this replication is little leſs general than ſuch a plea.

Clayton Serjt. *contrà.* In *Lutw.* 421. it is ſaid by the Court that when matter tends to great prolixity, a conciſe manner of pleading ought to be admitted (*c*). Had we ſtated the account between *R. Spratlin* and the Plaintiffs, it would have rendered the pleadings intolerably prolix. Previous to the caſe of *Jones* v. *Williams*, the form of pleading was the ſame as that here made uſe of. That caſe was little diſcuſſed, and no authorities were cited in ſupport of the determination. In Lord *Arlington* v. *Meyricke*, 2 *Saund.* 413. which was debt on bond for the performance of covenants, and performance pleaded, the replication was general that the Defendant had received a certain ſum for letters and packets, and had not accounted for the ſame with the poſt-office, and though *Saunders* took exception to the replication upon other grounds, no objection was made to its generality. So in *Lilly's Entr.* 114. there is a precedent of the ſame kind. The ſame form was fol-

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(*a*) Vid. tam *Farrow* v. *Chevalier*, 1 *Salk.* 139.. 1 *Ld. Raym.* 478. S. C. where *Holt* Ch. J. and *Gould* J. ſay, that more certainty is requiſite in the replication in debt on bond than in the breach in covenant. In that caſe, which was covenant, the breach laid was for ſelling *diverſis diebus et vicibus between ſuch a day and ſuch a day to H. and ſeveral perſons unknown*, and it was moved in arreſt of judgment that the breach was uncertain *as to times and perſons*; but held well enough.

(*b*) See a very full note on this ſubject in 1 *Saund.* 58. by Mr. Serjt. *Williams.*

(*c*) Vid. etiam *Mints* v. *Bethil*, *Cro. Eliz.* 749. *Braban* v. *Bacon*, *Cro. Eliz.* 916. *Cryps* v. *Bainton*, 3 *Bulſt.* 31. *Banks* v. *Pratt.* *Sty.* 420. 428. *Jenny* v. *Jenny*, Sir *T. Raym.* 8. and *J'Anſon* v. *Stewart*, 1 *Term Rep.* 753. per *Buller* J.

lowed in *Cornwallis* v. *Savery*, 2 *Burr.* 772, and held good on demurrer. The averment there was, that the Defendant as agent to a regiment had received *ſeveral ſums of money amounting in the whole to* 14,000*l.* on account of the regiment, and had not paid them over. To the ſame purpoſe may be cited the ſeveral replications in *Simmons* v. *Langhorne* (*a*), 2 *Wilſ.* 11. *Wright* v. *Ruſſell*, 3 *Wilſ.* 535. and *The Iriſh Society* v. *Needham*, 1 *Term Rep.* 483.

Le Blanc in reply. None of the caſes cited are authorities to govern the preſent. The *dictum* of the Court in *Lutwytche* muſt be read with this qualification: that the conciſeneſs alluded to be conſiſtent with juſtice. In *Saunders* the averment that the money was received *for letters* and *packets* was ſufficiently preciſe. With reſpect to *Cornwallis* v. *Savery*, it was there averred, that the money was received from the Paymaſter General, which differs it from this caſe, where it is not ſtated from whom the ſums were received. There alſo the demurrer, though profeſſing to be ſpecial, was in fact but general, ſince the epithets do not amount to an aſſignment of any ſpecial cauſe. So the caſes of *Wright* v. *Ruſſell*, and *The Iriſh Society* v. *Needham*, were both on general demurrer, and this point was not raiſed.

Eyre Ch. J. When I read this demurrer, it appeared to me a point of extreme conſequence, ſince any departure from the general way of ſtating the breach uſed in this replication would lead to an inconvenient length of pleading, which the Court will not determine to be neceſſary unleſs compelled by a ſeries of authorities. One decided caſe only has been cited; but that caſe does not direct how the ſtatement ſhould be made, for the extent of *Jones* v. *Williams* is, that enough was not there ſtated. I confeſs I am not ſatiſfied that the deciſion of that caſe was conſiſtent with the general rules of pleading. Whether a breach be ſufficiently aſſigned or not, is to be decided by the rules of law and the forms of pleading. By the former the party muſt ſhew ſome fact which is a breach in the words of the condition. Where many ſums

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(*a*) *Quær. tam.* For there, to debt on bond to ſave harmleſs from expences by reaſon of naming one to a curacy, or from ſuits by reaſon thereof, *non damnificatus* being pleaded, the Plaintiff replied that he was obliged to pay ſuch a ſum by reaſon of ſuch nomination, without ſaying *how* he was obliged to pay; and though the replication was held well enough on general demurrer, the Court ſeemed to intimate that it might have been otherwiſe on ſpecial demurrer. But the circumſtances of the damnification were in that caſe more within the knowledge of the obligee than of the obligor, whereas that obſervation does not apply to the principal caſe.

have been received, it is not each ſum, but all taken together, that conſtitute the breach, which muſt therefore be ſo ſtated. All the ſums ſo received are according to the condition to be duly delivered. Here then the Plaintiff ſtates, that *R. Spratlin* has received *divers ſums of money* and has not *given*, *rendered*, *and paid*, *&c.* in the words of the condition. This allegation is indeed general, but from the nature of the fact it could not be otherwiſe. It was not contended in argument that extreme particularity was requiſite, or that every ſum need be ſtated; but it was ſaid that the deſcription of the receipt ſhould have been ſhewn, that the money received by *R. Spratlin* muſt be divided into two claſſes, *viz.* money received from his employers and money received from the cuſtomers, and that it ſhould have been ſhewn to which of theſe claſſes the ſums received belonged. This, however, is but an imaginary diviſion, for ſtill the particulars would be unknown. The Defendant only experiences the ſame difficulty which occurs in all matters *in pais* which come before the Courts, eſpecially on the general iſſue. This difficulty is unavoidable, for *in pais* facts may be either ſingle or accumulated. Though the books afford no expreſs deciſions on this ſubject, yet a ſeries of ſimilar replications are ſufficient to eſtabliſh the form of pleading. Had the form adopted in the caſes cited been thought deficient by the profeſſion, an exception to it would certainly have been taken. None having been taken, we may infer a concurrence of opinion ſufficient to outweigh the authority of one vague caſe like that in *Douglas*, which points out no way of framing a replication, and which neceſſarily tends to load the record with a multitude of allegations. I am therefore of opinion, that this replication is agreeable to the rules of law and precedents. It is a rule that iſſue cannot be taken on a plea of general performance, becauſe ſuch a plea goes to a multitude of facts, one of which the Plaintiff muſt ſelect. But where a covenant relates to one fact only, iſſue might be taken on the plea of performance without any objection, were it not for the general rule, which requires that to ſuch a plea the Plaintiffs muſt reply. The argument therefore, which has been drawn from that rule affords no objection to this replication when the Plaintiffs have ſhewn one breach in the words of the condition. I think we ought to diſcourage demurrers of this kind.

HEATH J. This demurrer reſts ſolely on the caſe in *Douglas*, and the caſes cited the other way prove that the rule there laid down is neither conſiſtent with the current of authorities previous to that time, nor has ſince been univerſally acted upon. My brother *Le Blanc* admitted that it was not neceſſary to ſtate each particular ſum, but according to the caſe in *Douglas* ſuch a ſtatement would be neceſſary, for no rule can be laid down limiting the degree of particularity to be employed. The breach in ſubſtance is, that *R. Spratlin* has not accounted for what he has received. Theſe parties might have divided the condition of the bond into diſtinct parts, which would have compelled the Plaintiff to ſelect his breach and aſſign it ſeparately. The method of averring Barratry is a ſtrong inſtance of the conciſeneſs allowed in pleading.

ROOKE J. The authorities cited of a date previous to the caſe in *Douglas*, ſhew the practice before that deciſion to have been in favour of this replication. It is ſufficient that the breach is aſſigned in the words of the condition.

The Court were about to give judgment (*a*) for the Plaintiffs, but on the application of *Le Blanc*, gave him leave to withdraw his demurrer and rejoin.

(*a*) A ſimilar caſe of *Barton and Another* v. *Webb and Another*, executors, came on in *B. R. Hil.* 40 *Geo.* 3. and received a ſimilar deciſion.

MURRAY *v.* HUBBART.

Feb. 11th.

Defendant being arreſted by the name of *F. H.* put in bail by the name of *S. H.*; Plaintiff then declared thus: " *S. H.* arreſted by " the name " of *F. H* " was attached to " anſwer, " &c." Defendant without craving oyer pleaded in abatement of the writ that his name was *S. H.*; Plaintiff having treated this plea as a nullity, and ſigned judgment accordingly, the Court refuſed to ſet it aſide.

THE Defendant in this caſe being arreſted on a *capias ad reſpondendum*, iſſued againſt him by the name of *Francis Hubbart*, put in bail by the name of *Samuel Hubbart*. Upon this the Plaintiff declared againſt him thus: " *Samuel Hubbart* arreſted by the " name of *Francis Hubbart* was attached to anſwer *George Murray* " of a plea of treſpaſs on the caſe" &c. and throughout the declaration called him *Samuel*. The Defendant pleaded as follows: " And the ſaid *Samuel Hubbart* againſt whom the ſaid original writ " of the ſaid *George* hath been ſued out by the name of *Francis* " *Hubbart* in his proper perſon comes and pleads that he was baptized by the name of *Samuel Hubbart* at *Boſton* in the State of " *Maſſachuſſets* in *North America* and by the name of *Samuel* " *Hubbart* hath always hitherto ſince his baptiſm been called and " known, to wit at *London* aforeſaid in the pariſh and ward afore- " ſaid; without this that the ſaid *Samuel* now is or at the time of " ſuing forth the ſaid original writ of the ſaid *George* was or ever " before had been, or ever ſince hath been called by the Chriſtian " name of *Francis* as by the ſaid writ is above ſuppoſed. And " this he the ſaid *Samuel* is ready to verify. Wherefore he prays

" judgment

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" judgment of the ſaid writ and that the ſame may be quaſhed." In ſupport of this plea in abatement, there was the uſual affidavit of the truth of its contents.

Early in this term an application was made to the Court on the part of the Plaintiff for leave to treat this plea as a nullity, and to ſign judgment notwithſtanding. But the Court refuſed to make any rule in that ſtage of the proceedings, ſaying that the Plaintiff might ſign judgment if he thought proper, and leave it to the Defendant to move to ſet that judgment aſide.

Accordingly judgment having been ſigned by the Plaintiff, and a rule *niſi* obtained by the Defendant to ſet it aſide for irregularity;

Clayton Serjt. ſhewed cauſe and contended that the Defendant having appeared by the name of *Samuel*, the Plaintiff had a right to declare againſt him by that name. *Hole* v. *Finch*, 2 *Wilſ.* 393. and *Doo* v. *Butcher*, 3 *Term Rep.* 611. That this plea was a nullity, for there could be no plea to the writ without *oyer*; *Com. Dig.* tit. *Abatement* (H 1.), (*a*) that the Court would not now grant *oyer* of the writ; *Boats* v. *Edwards* (*b*), *Doug.* 228. and that if the plea were a nullity the Plaintiff might ſign judgment. *Wagſtaffe* v. *Long*, *Barnes* 263. *ed.* 3. He alſo cited Sir *William Hick*'s caſe, 1 *Vent.* 154.

Heywood Serjt. *contrà* inſiſted, that if the plea were bad it ought to have been demurred to: that there was no authority in the books in which *oyer* of the writ had been craved in order to plead miſ-

nomer

(*a*) So in *Theloall's Digeſt*, *lib.* 10. *cap.* 2. *ſ.* 1. it is ſaid " *homme ne puit dire riens al Briefe devant oier eu del Briefe*; *pur que demandons oier del Briefe*," and *Bracton lib.* 5. *cap.* 17. is there cited.

(*b*) See alſo *Reg. Gen. T.* 19 *Geo.* 3. *B. R.* to the ſame effect, and *Spalding* v. *Mure*, 6 *Term Rep.* 364. where the Court ſaid " formerly a variance between the writ and declaration might have been taken advantage of by the Defendant's craving *oyer* of the writ; but the Court have laid down a rule that the Defendant ſhall not have *oyer* of the writ for the purpoſe of ſetting aſide the proceedings." According to the report in *Douglas* of *Boats* v. *Edwards*, a caſe in the common pleas was much relied on, which caſe, as appears from the note, was *Ford* v. *Burnham*, *Barnes* 340. *ed.* 3. There Defendant having pleaded a tender *ante diem impetrat : brev : orig :* Plaintiff replied an original before the tender; upon which Defendant prayed *oyer*, which was denied; and it was ſaid, that " the Court never make rules for *oyer* of originals which are matters of record." It is to be remarked, however, that the Defendant in that caſe, by the regular courſe of pleading, inſtead of praying *oyer*, ſhould have rejoined *nul tiel record*: and that in two ſubſequent caſes, viz. *Vanderplank* v. *Banks*; *C. B.* 2 *Wilſ.* 85. and *Hole* v. *Finch*, 2 *Wilſ.* 293. the Court of *Common Pleas* held, that a variance between the writ and count cannot be taken advantage of without craving *oyer* of the writ; but in neither of thoſe caſes was it ſaid, that if *oyer* had been craved, it would have been refuſed, though in the latter it was ſaid, that in ſuch a caſe the Maſter of the Rolls on application would order right originals to be made out.

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nomer in abatement; and that this therefore was an experiment, for if the Plaintiff had demurred he could only have had a judgment of *reſpondeas ouſter*. He urged that this was not a plea to the juriſdiction, but to the perſon, and that no plea to the perſon could be pleaded after *oyer*. *Theloall's Dig. l.* 14. *c.* 5. and that a precedent of ſuch a plea pleaded without *oyer* was to be found in *Aſton's Entries*, (*a*) 1. *pl.* 2.

Cur. adv. vult.

The judgment of the Court was this day delivered by

EYRE Ch. J. On looking into the record, it appears to us that the plea proceeds upon a miſtake of the ſtatement of the writ in the declaration: it ſuppoſes the writ to have been ſued out againſt the Defendant by the name of *Francis*, whereas the plea alleges that his name is *Samuel*. But the writ as recited at the head of the declaration is not againſt *Francis*, but againſt *Samuel*; it is that *Samuel* was attached to anſwer; *Samuel* arreſted indeed by the name of *Francis;* the arreſt, however, is not the operation of the writ, but of the meſne proceſs, which is out of the queſtion after appearance. Now, taking it that the writ is recited to be a writ againſt *Samuel*, the plea only affirms the writ: taking the plea to amount to a denial that the writ was againſt *Samuel*, and an averment that it was againſt *Francis*, it is clear, (without entering into the queſtion of *oyer*, and the learning on that ſubject,) that the Defendant muſt offer in ſome manner to make out the contents of the matter of record; this he has not done, miſtaking, as we ſuppoſe, the import of the recital of the writ in the declaration. If it be ſaid that the writ ought not to have been ſo recited, it may be anſwered, firſt, that is not now the queſtion; and ſecondly, there is no reaſon why it ſhould not be ſo recited; for the objection to the meſne proceſs being cured by appearance in the true name, the writ, whenever it is properly called for, will be found to be a writ againſt the party by his true name. In the caſe of *Hole* v. *Finch*, the parties being probably aware how eaſily the miſtake in the meſne proceſs would be rectified upon the record after appearance, applied to ſet aſide the meſne proceſs for irregularity. The application before appearance would in all probability have been granted. But the Court refuſed to do it after appearance, and intimated that the miſtake might be cured in the way which I have mentioned. The caſe, therefore, comes to this, that ſo long

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(*a*) *Vid. etiam Raſtall's Entr.* fo. 107. *Herne's Pleader*, 1. and 1 *Wentworth's Syſt. of Plead.* 3. 38. 47. However, in *Hole* v. *Finch*, 2 *Wilſ.* 293. where the objection was grounded on a miſnomer in the writ, the court ſeemed to think that *oyer* ſhould have been craved.

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as it is the practice of the Court to iſſue the meſne proceſs firſt, and to allow an original to be ſued out afterwards, if neceſſary to ſubſtantiate the proceedings, no advantage can be taken after appearance of a miſnomer in the meſne proceſs. If, indeed, the Plaintiff carry the ſame miſtake into the declaration, the plea of miſnomer will ſtill be open to the Defendant, for then both the writ and the declaration will appear upon the record to be againſt the Defendant by a different name from that which the plea ſtates to be the name of baptiſm, and ſo the plea will be an anſwer to the writ and declaration. Here, as I have obſerved, it ſays no more than the writ and declaration have ſaid; it is not an exception to, but an affirmation of the Plaintiff's proceedings as they appear upon the record. The plea, therefore, being bad and wholly unavailing, we think the judgment was properly ſigned; but as the caſe is involved in ſome perplexity, it may be right to let the party in to plead upon proper terms.

On a ſubſequent day, however, the rule was diſcharged without coſts.

Feb. 13th.

COLLINS *v.* MARTIN and Others.

If *A.* depoſit bills indorſed in blank with *B.* his banker, to be received when due, and the latter raiſe money upon them by pledging them with *C.* another banker, and afterwards become bankrupt; *A.* cannot maintain trover againſt *C.* for the bills.

THIS was an action of trover for two bills of exchange depoſited with the Defendants under the following circumſtances. The bills were ſent by the Plaintiffs to Meſſrs. *Nightingales*, his bankers, indorſed in blank, in order to be received by them when due, and to be carried to his account. In the bankers' book they were entered ſhort: and the ballance of account between the bankers and the Plaintiff was in favour of the latter. The *Nightingales* being in want of money depoſited the bills in queſtion, among others, with the Defendants, who were alſo bankers; and gave them an acknowledgment in writing for a ſum of money received upon this depoſit. The *Nightingales* having failed, this action was brought to recover the bills. *Eyre* Ch. J. before whom the cauſe was tried at the *Guildhall* ſittings after *Michaelmas* Term 1796, finding upon enquiry that there was no evidence to ſhew that the Defendants knew the circumſtances under which the bills came into the hands of the *Nightingales*, or the ſituation of the account between them and the Plaintiff, directed a nonſuit. To ſet aſide this nonſuit, a rule *niſi* having been obtained upon a former day;

Le Blanc and *Palmer* Serjts. in the courſe of the term ſhewed cauſe. This caſe may be decided without breaking in upon the doctrine of pledges, or denying that bankers are in ſome reſpects

factors.

factors. The fallacy upon which the motion to ſet aſide the nonſuit proceeds, is this; that bankers are to be taken abſolutely as factors in every caſe. To that extent, however, the caſes have not gone; though, where a queſtion has ariſen between the aſſignees of a banker who has failed and his cuſtomer, the Courts have compared the banker to a factor; as in *Zinck* v. *Walker*, 2 *Bl.* 1154. The analogy does not hold between bills and goods, for the poſſeſſion of goods does not veſt the property, ſince the transferree's title can never be better than the transferrer's. But with reſpect to bills the whole property in them paſſes by indorſement; and it is immaterial to the perſon who takes a bill with a blank indorſement, whether the title of him from whom he takes it be good or not. This diſtinction has been acknowledged even in caſes where the title to a bill has been derived to the holder from perſons who obtained it by finding or theft. *Grant* v. *Vaughan*, 3 *Burr.* 1516. and *Miller* v. *Race*, 1 *Burr.* 452. It makes no difference whether the conveyance of theſe bills was abſolute, or whether it was only *ſub modo* as to the time or conditions under which they were to be held. The Plaintiff having parted with the whole property in the bills, and put them into the hands of the *Nightingales* like a marked guinea or a bank-note, the only queſtion is, Whether the Defendants, when they received them from the *Nightingales*, paid a valuable conſideration for them? That indeed is not denied; but the exception taken is to the mode of transfer. In fact, the Defendant diſcounted the bills for a part of the time which they had to run, the *Nightingales* reſerving to themſelves the power of redemption. In the caſe of *Goldſmyd and Another* v. *Gaden and Another*, in *Chanc.* 13th *June* 1796, the Plaintiffs, who were brokers, advanced money on three navy bills and a depoſit of ſcrip; and though it afterwards appeared that both navy bills and ſcrip were left by the Defendants in the hands of the party depoſiting, for a particular purpoſe, and were not his property, but the property of the Defendants, yet on a bill filed in equity, it was referred to the maſter to take an account of what was due to the Plaintiffs, and an iſſue at law was refuſed by the Chancellor, who thought the queſtion too clear to be diſputed. Now as navy bills paſs by an indorſement in blank, and are not filled up till the holder comes for the money, they may be compared to bills of exchange indorſed in blank by the payee. The only queſtion which has ever ariſen in caſes of this kind has been, Whether the holder came honeſtly by the bills? As in *Hinton's Caſe*, 2 *Shower*, 235. & *Crawley* v. *Crowther*,

v. *Crowther*, 2 *Freem.* 257. both cited by Lord *Manſfield*, in *Grant* v. *Vaughan*, 3 *Burr.* 1524. and *Peacock* v. *Rhodes*, *Doug.* 633.

Shepherd and *Heywood* Serjts. in ſupport of the rule. It may be admitted, that there is a diſtinction between goods and bills, though not to the extent contended for. Generally ſpeaking, the property in goods ſold does not paſs by the ſale, where the vendor is not entitled to ſell; but if they be ſold in market-overt, it does, becauſe the ſale is in the ordinary courſe of trade. So the property in theſe bills did not paſs to the Defendants, becauſe they were not negotiated in the ordinary courſe, and therefore they are ſubject to the ſame reſtriction as goods. It is true that the *Nightingales* themſelves gained ſuch a property in theſe bills as would have enabled them by transfer to convey the abſolute property to a third perſon: but they were not entitled to depoſit them with a third perſon by way of pledge. If the factor, who has a lien upon goods or bills of his principal, cannot transfer that lien to another, *Daubigny* v. *Duval*, 5 *Term Rep.* 604. much leſs can he who has no lien, as in this caſe, create a lien in his transferree. The uſe which was made of theſe bills was clearly a fraud in the *Nightingales*, to whom they were remitted for ſafe cuſtody, and were by them entered ſhort in their books. An attempt has been made to liken bills of exchange to navy bills; but in *Macliſh* v. *Ekins*, *Sayer*, 73. it was held, that a navy bill would not paſs without an aſſignment. The negotiability of any inſtrument depends on the nature of the inſtrument. Now, it is the nature of a navy bill to be paſſed without any indorſement, and therefore it is the uſual courſe to pledge them. In *Ford* v. *Hopkins*, 1 *Salk.* 283. where lottery tickets had been lodged with a banker that he might receive the money due on them, it was held that he could not exchange them. A bill indorſed in blank to a banker, is ſo indorſed, either to enable him to receive the amount, or to aſſign it abſolutely: third perſons know that a banker has theſe two powers, but they alſo know, that he has not the power to pledge. If, therefore, they take a bill from a banker indorſed in blank as a pledge, they take it at their peril, for the indorſement is not even *primâ facie* evidence of a right to pledge.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Eyre Ch. J. We are all of opinion that this Plaintiff was properly nonſuited; and that there ought to be no new trial. I have little to add to what I ſtated to be the ground of this nonſuit when I made my report. The Counſel for the Plaintiff admitted that the bankers might have ſold theſe bills, but it was argued that they could not pledge them; and the caſe of a factor pledging the property of his principal, was urged as an authority; for it was ſaid, that bankers have been conſidered as factors. In queſtions between bankers, or thoſe repreſenting them, and their cuſtomers, they have been conſidered to ſome purpoſes as factors or in the nature of factors; upon the ſame principle as in other caſes, between holders of bills of exchange, and acceptors, or the firſt indorſer of bills payable to a man's own order, the truth of the tranſactions between them has been allowed to be entered into to deſtroy the *primâ facie* conſideration of a bill, the ſuppoſed value received. But no evidence of want of conſideration, or other ground to impeach the apparent value received, was ever admitted in a caſe between ſuch an acceptor or drawer, and a third perſon holding the bill for value. And the rule is ſo ſtrict, that it will be preſumed, that he does hold for value until the contrary appears. The *onus probandi* lies on the Defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the firſt holder, and will be affected by every thing which would affect that firſt holder. This all proceeds upon an *argumentum ad hominem*; it is ſaying, you have the title, but you ſhall not be heard in a Court of Juſtice to enforce it againſt good faith and conſcience. In ſtrict law, and with reſpect to third perſons, bankers do not at all reſemble factors; nor will the rule that factors cannot pledge, apply to the caſe of a banker pledging indorſed bills. That rule is grounded on the ſtrict rule of property; the goods are not the factor's, and therefore he cannot pledge them. He may ſell them, becauſe, though they are not his, he is intruſted to ſell them for his principal. He manages the ſale, but it is his principal who through him ſells them. For the purpoſe of rendering bills of exchange negotiable, the right of property in them paſſes with the bills. Every holder with the bills takes the property, and his title is ſtamped upon the bills themſelves. The property and the poſſeſſion are inſeparable. This was neceſſary to make them negotiable, and in this reſpect they differ eſſentially from goods of which the property and poſſeſſion may be in different perſons. The property paſſing with the poſſeſſion, it is admitted that a banker who receives indorſed bills from his cuſtomers to be got in when due, and carried to his account, may diſcount or ſell them. Why may he not pledge them? Either is a breach of the confidence repoſed in him. He may ſell becauſe the property has been

entruſted

entruſted to him,—and he may pledge for the ſame reaſon; for he who has the property has a diſpoſing power, and the law has not limited it to be uſed in any particular manner. Perhaps the confidence repoſed in bankers may be abuſed, and it might be wiſhed that they could be reſtrained from abuſing their truſt. But an arbitrary reſtriction cannot be impoſed; any reſtriction would poſſibly check the facility of negotiation. As in caſes of other property we ſay *caveat emptor*, ſo in this particular caſe we may ſay to the cuſtomer who prefers to entruſt his banker with his bills and his caſh, rather than to be at the trouble of doing his own buſineſs, *caveat*.

Per Curiam, Rule diſcharged.

Walwyn and Others *v.* St. Quintin.

Feb. 13th.

Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former; though the indorſer have. If the holder after proteſt for non-payment and notice to the drawer, forbear to ſue the acceptor, the drawer is not thereby diſcharged. So after proteſt only, if the drawer be not entitled to notice. *Secus* before proteſt; or if the holder take ſecurity from the acceptor after proteſt. If the holder receive part-payment of the indorſer, he may ſtill recover the reſidue againſt the drawer; if not the whole.

Assumpsit on a bill of exchange drawn by the Defendant on one *Deane*, by whom it was accepted, in favour of one *Thomas*, by whom it was indorſed to the Plaintiffs. At the trial before *Eyre* Ch. J. at the *Weſtminſter* ſittings after *Michaelmas* Term 1796, it appeared, that the bill was drawn to accommodate the indorſer who had placed ſecurities on which he wiſhed to raiſe money in the hands of the acceptor, but that the drawer had no effects in his hands; that the bill not being paid when due, was proteſted, but no notice was given to the drawer of the non-payment till four days afterwards; that in *April* laſt, the Plaintiffs having threatened to proceed againſt the indorſer and acceptor, the indorſer paid 40*l.* 5*s.* to the Plaintiff's attorney, which the latter ſwore was upon account only, though the indorſer himſelf gave in evidence (but was not believed) that it was paid upon a promiſe that no proceedings ſhould be inſtituted againſt him; that the Plaintiffs having received a letter from Mr. *Anneſley*, repreſenting the probability of the acceptor's being able to pay at a future period, returned an anſwer in which they agreed not to preſs him; and that the drawer before the bill fell due having become inſolvent and aſſigned over his effects to his creditors, quitted the uſual place of his abode, and went to reſide elſewhere. The jury having in anſwer to queſtions put by the Lord Chief Juſtice, found, firſt, that the bill was not a mere accommodation bill, the indorſer having effects in the acceptor's hands; ſecondly, that the Defendant did not quit his place of abode with a view to abſcond; and thirdly, that the 40*l.* 5*s.* were paid by the indorſer upon account, not upon any

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agreement,—proceeded under his Lordſhip's direction to give a verdict for the Defendant; but if the Court ſhould be of opinion that the Plaintiffs were entitled to recover, then the verdict to be entered for them for ſo much of the bill as was unpaid. Accordingly a rule *niſi* having been obtained for that purpoſe,

Clayton Serjt. ſhewed cauſe, and contended, firſt, That if any notice to the drawer of non-payment by the acceptor was neceſſary, the notice given in this caſe was too late and therefore inſufficient, and that although it appeared that the drawer had no effects in the acceptor's hands, ſtill as the indorſer had, notice was not to be diſpenſed with; for that the ground on which it had been diſpenſed with where the drawer has no effects in the hands of the acceptor had been, that the tranſaction is fraudulent, there being nothing to repreſent the bill, *Bickerdike* v. *Bolman*, 1 *Term Rep.* 405.; and that although in this caſe the drawer had left his place of abode before the bill fell due, ſtill notice ſhould have been left at his laſt place of reſidence; ſecondly, That the holder having given time to the acceptor, had thereby diſcharged the Defendant, for even admitting notice in this caſe not to have been neceſſary, in order to ſhew that the note was not paid, yet it was neceſſary for the purpoſe of ſhewing that the holder looked to the Defendant for payment and meant to ſue him, *Tindall* v. *Brown*, 1 *Term Rep.* 167.; thirdly, That the defendant was diſcharged by the Plaintiffs' receiving part-payment of the note from the indorſer, *Kellock* v. *Robinſon*, *cor. Eyre* Ch. J. *Guildhall*, 2 *Str.* 745. and *Taſſel and Another* v. *Lewis*, *cor. Holt* Ch. J. *N. P.* 1 *Ld. Raym.* 744.

Shepherd Serjt. in ſupport of the rule inſiſted, firſt, That the ground on which it had been held neceſſary to give notice to the drawer of non-payment by the acceptor was, that the former might be able to withdraw thoſe effects which he had placed with the acceptor to anſwer his acceptance, and that *Bickerdike* v. *Bolman* proceeded on this principle; that in this caſe, therefore, the drawer having no effects in the hands of the acceptor, no notice was neceſſary, nor if neceſſary could it have been given, the drawer having left his place of abode; ſecondly, that the Defendant was not diſcharged by the indulgence given to the acceptor, for that is only a diſcharge in caſes where notice is neceſſary; where it is not neceſſary the drawer is not diſcharged but by an expreſs renunciation on the part of the holder, of his right to ſue him, *Dingwall* v. *Dunſter*, *Doug.* 247. and *Black* v. *Peele*, *cit. ibid.*; that although thoſe were caſes of acceptors, yet that the drawer after notice,

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notice, or in a caſe where no notice is required, ſtands preciſely in the ſame ſituation as the acceptor; thirdly, that the ſame principle might be applied to the objection of the Plaintiffs having received part-payment of the note from the indorſer, for that in *Johnſon* v. *Keyſon*, *Bull. N. P.* 271. *ed.* 3. it was held, that the receipt of part of the money from the acceptor or indorſer *without notice* to the drawer diſcharges him, but that *with notice* it does not; that here, therefore, where the drawer was entitled to no notice, a receipt of part-payment from the indorſer would not diſcharge him.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Eyre Ch. J. In this caſe we did very little more at *niſi prius* than eſtabliſh the matter of fact upon which the points of law were to ariſe. Many have ariſen. This being an action againſt the drawer, the firſt point made relates to the want of notice being given to him of the acceptor's refuſal to pay. The Plaintiffs inſiſt that it was not neceſſary to give this notice for two reaſons: firſt, becauſe the drawer had no effects in the hands of the acceptor; and ſecondly, becauſe before the bill became due he had left his place of abode, and the holder of the bill did not know where to find him. If the firſt reaſon is ſufficient we need not go further. The jury have found that the acceptor had effects in account with the payee. But the true fact is, that this was the acceptor's bill, and not the drawer's. In a regular bill tranſaction the drawing by *A.* payable to *B.*, or payable to *A.*'s own order, and indorſing the bill to *B.*, is a mode by which the drawer pays a ſum of money to his payee or indorſee through an acceptor. The tranſaction in this caſe, as far as it had pretenſions to be deemed a real tranſaction, was a mode by which the acceptor advanced a ſum of money to the payee, and the drawer was a mere inſtrument of the acceptor. This is reverſing the order of things. As far as concerns the drawer, it is what it has been called, a mere accommodation; and all conſideration of effects of the drawer in the hands of the acceptor may be laid aſide. It ſeems clear, that notice can be of no uſe to him; his ſituation being this, that if the acceptor does not pay he muſt, and may then and not till then reſort to the acceptor to be re-imburſed: notice therefore can amount to nothing, for his ſituation cannot be changed. If there be any caſe in which notice ſhould be diſpenſed with, ſurely it is this. Perhaps, indeed, it ought never to be diſpenſed with, ſince it is a part of the ſame cuſtom of merchants which creates the duty; eſpecially as the grounds for diſpenſing with it are ſuch as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice; for ninety-nine times in a hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whoſe accommodation the bill was drawn. It has, however, been reſolved in many caſes where the drawer has had no effects in the hands of the acceptor, that notice might be diſpenſed with. But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands notice is not neceſſary. The caſes of acceptances on the faith of conſignments from the drawer not come to hand, and the caſe of acceptances on the ground of fair mercantile agreements, may be ſtated as exceptions; and there may poſſibly be many others. Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpoſe of raiſing money by diſcount for himſelf, and *à fortiori* for the acceptor, which is this caſe, it is fairly deducible from the caſes which have been reſolved, that notice need not be given. And this makes it unneceſſary to inquire whether the drawer's abſenting himſelf from his place of abode before the bill became due, will excuſe the want of notice. The ſecond point neceſſary to be conſidered is, whether the holder of the bill has diſcharged the drawer by forbearing to proceed againſt the acceptor on the application of Mr. *Anneſley*. Had this forbearance taken place before noting and proteſting for non-payment, ſo that the bill had not been demanded when due, it is clear that the drawer would have been diſcharged: it would have been giving a new credit to the acceptor; and the holder not having purſued the cuſtom, this would have been deemed, as between the holder and the drawer, laches ſufficient to diſcharge the drawer. But after proteſt for non-payment, and notice to the drawer, or what has been equivalent to notice, a right to ſue the drawer has attached, and the holder is not bound to ſue the acceptor: he may therefore forbear to ſue him. Is then the anſwer to Mr. *Anneſley*'s letter more than mere forbearance? If the holder enters into a new agreement with the acceptor for ſecuring the payment of the bill, that may ſatisfy the bill as between him and the drawer, and may be conſidered as a new credit to the acceptor. There was in this caſe a treaty for ſuch ſecurity, but it went off. Propoſals for a ſecurity bind no one unleſs they can be made uſe of to impute laches: and after

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the proteſt no laches can be imputed. The laſt point is, that the holder having accepted 40 *l.* 5 *s.* from the payee on account of this bill, the drawer is thereby diſcharged. I do not recollect that this point was urged at *Niſi Prius*. It is ſuppoſed to be ſupported by the authority of very great names. In *Taſſel & Lee* v. *Lewis*, 1 *Ld. Raym.* 743. the cuſtom of merchants was ſtated by merchants in evidence as was then the courſe; and it was there agreed by *Holt* Ch. J. that if the indorſee of a bill accept but two-pence from the acceptor, he can never after reſort to the drawer. *Kellock* v. *Robinſon*, 2 *Str.* 745. was an action brought by the indorſee of a promiſſory note againſt the indorſer: it appeared, that the Plaintiff after the indorſement had received part of the drawer of the note, and it was held to be a taking upon himſelf to give the whole credit to the drawer, and abſolutely to diſcharge the indorſer; ſo the Plaintiff was non-ſuited. The rule in both caſes is laid down in the moſt general terms without qualification or exception, and down to that time muſt have been conſidered as ſettled law. On the other hand, there is in Mr. Juſtice *Buller's Introduction to the Law relative to the Trials of Niſi Prius*, (*a*) a note of the caſe of *Johnſon* v. *Kenyon*, in this Court, *Hil.* 5 *Geo.* 3. which is probably Lord *Bathurſt's* own note. In that note the rule is ſtated with this exception; "unleſs he give timely notice to the drawer that the bill is not paid: For," it is ſaid, "where a man takes part of the money only, and does not apprize the drawer that the whole is not paid, he gives a new credit for the remainder. But where *timely notice* is given that the bill is not duly paid, the receiving part of the money from the acceptor or indorſer will not diſcharge the drawer or other indorſers: for it is for their advantage that as much ſhould be received from the others as may be." I will not ſay that this is not a reaſonable qualification of the rule: but it requires ſome further inveſtigation; and the rather as the want of notice recurs, and furniſhes the appearance of an objection to the application of that caſe to the caſe now in judgment. That caſe ſuppoſes timely notice to have been given to the drawer that the bill is not paid. In our caſe we have got to the length of reſolving that notice is diſpenſed with for one purpoſe, *viz.* to make the drawer anſwerable. Will it follow, that in reſpect of the conſequence of receiving part of the money from the acceptor or indorſer, according to the language of the caſe in Mr. Juſtice *Buller's* book, the notice ſhall alſo be diſpenſed with? This would be carrying that caſe a ſtep further than the caſe itſelf goes; when, perhaps,

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(*a*) *P.* 271. *ed.* 3.

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the reaſon why notice is neceſſary in the latter inſtance is not the ſame as in the former. Notice is required in the one to make the drawer reſponſible: it ſeems neceſſary in the other to prevent his being diſcharged from his reſponſibility. The effect of certain circumſtances may be, that he may become reſponſible without notice: but being reſponſible, is not his reſponſibility to remain, or be diſcharged in the ſame manner as the reſponſibility of any other drawer who is made reſponſible by having notice? Giving a new credit to the acceptor would undoubtedly diſcharge a drawer made reſponſible without notice. Then is not the receiving a part of the money conſidered as giving a new credit? The note in the *Introduction to the Law of Niſi Prius* (*a*) ſays, the indorſer is diſcharged becauſe "the indorſee has made his *election* to have his money from the "drawer." This is not very intelligible. In *Kellock* v. *Robinſon* (*b*), the reaſon given is, that the holder takes upon himſelf to give the whole credit to the drawer. In one reſpect the two notes in *Lord Raymond* and *Strange* are imperfect; namely, that they do not ſtate whether the money was received before, or at the time when the bill became payable, or whether after proteſt, and perhaps notice alſo, when the rights of the holder had attached. In the latter caſe poſſibly a payment in part might be received from one without prejudice to the right to proceed againſt another for what remains unpaid, upon the ground ſtated by Mr. J. *Buller*, that it is for the intereſt of all who are liable, that as much ſhould be received as can be got. And doubtleſs receiving part is a different thing from taking a ſecurity for the whole. The party gives no credit in reſpect of what he actually receives, and as to what remains unpaid, he is in the ſame ſituation as he was in before. The fact ſworn to by *Thomas* the indorſer, in oppoſition to the Plaintiff's attorney, if it had been believed, would have ſaved the trouble of diſcuſſing this part of the caſe. He ſwore that it was agreed, that in conſideration of 40 *l.* 5 *s.* to be paid, the holders would proceed no further on the bill. This muſt have diſcharged the drawer. But the attorney ſwore, and the jury found, that the money was received generally on account of the bill. We come now to a very material conſideration. Of whom was the money received? The anſwer is, of the payee; that is, it was paid by an indorſer to his indorſee, to whom he was reſponſible. But one indorſer may pay the whole money due upon a bill to another indorſer without ſatisfying the bill as between him and the

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(*a*) P. 273. where *Kellock* v. *Robinſon* is referred to.

(*b*) As reported in 2 *Str.* 745.

the acceptor and the drawer. It is every day's practice for a diſhonoured bill to be thrown back upon the firſt indorſer; each indorſer taking back from his immediate indorſer what he has paid on account of the bill, and at the ſame time delivering up the bill to him, and the latter again throwing it back on his immediate indorſer till it at laſt arrives at the firſt indorſer. *They* may arrange the matter among themſelves; and any one indorſer may ſue the acceptor or drawer inſtead of any of the preceding indorſers, ſtriking out all the names upon the bill below his own. According to the very perplexed report of the caſe of *Johnſon* v. *Kenyon*, in 2 *Wilſ.* 262. (*a*), the firſt indorſee of a diſhonoured bill for 1000 *l.* after receiving 232 *l.* from the payee who indorſed it to him, and getting back the bill from *Baldwyn* to whom he had indorſed it for value, and to whom he returned the money, recovered the whole 1000 *l.* againſt the drawer; and on a motion for a new trial the verdict was confirmed: and very rightly. It was nothing to the drawer how the indorſers arranged the buſineſs among themſelves. The point of notice ſuppoſed to be an ingredient in the caſe in Mr. Juſtice *Buller*'s note did not ariſe. It was aſſumed that the drawer was liable. The queſtion, as far as I can collect it, was, Whether the indorſee ſhould recover the whole 1000 *l.* againſt the drawer, having received 232 *l.* upon the bill from the firſt indorſer? which is exactly our caſe: and it was held that he ſhould; that he might recover for the firſt indorſer the 232 *l.* which the latter had paid, and that the Defendant could have no reaſon to complain, for he only paid what he ought to pay. If the acceptor had paid any thing on account of the bill, it had been otherwiſe: ſo much of the bill would then have been ſatisfied, and at furtheſt the reſidue only could be recovered againſt the drawer (*b*). According to the two notes in *Ld. Raymond* and *Strange*, nothing could have been recovered in that caſe againſt the drawer. But they are very ſhort notes; and poſſibly the rule may have been meant to be laid down only in reſpect of payment by acceptors when the bill is demanded. But whether that be ſo or not, they do not apply to this caſe; for they both ſpeak of the holder receiving a part-payment of the acceptor of a bill, or of the drawer of a promiſſory note who is an acceptor: whereas the caſe

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(*a*) In *Bacon* v. *Searles*, 1 *H. Bl.* 90. *Wilſon* J. obſerves, that the caſe of *Johnſon* v. *Kenyon* is inaccurately reported in 2 *Wilſ.* and that he was diſpoſed to think that the Chief Juſtice never ſaid what he is there reported to have ſaid.

(*b*) So *vice verſâ* if part be received from the drawer, the reſidue only can be recovered againſt the acceptor. *Pierſon* v. *Dunlop*, *Cowp.* 571. and *Bacon* v. *Searles*, 1 *H. Bl.* 88.

caſe now in judgment is a caſe where an indorſer has accepted a part of the bill from his indorſee, which in reaſon and juſtice, and according to the conſtant courſe of buſineſs, and upon the authority of the caſe of *Johnſon* v. *Kenyon*, will not prevent the whole bill from being recovered againſt the drawer.

The verdict is therefore to be entered for the Plaintiff, who as he is certainly not connected with the firſt indorſer, will of courſe be content with the balance due to him.

Per Curiam, Poſtea to the Plaintiff.

Mr. Juſtice **BULLER** was abſent the whole of this Term from indiſpoſition.

END OF HILARY TERM.

DOE ex dem. GERTRUDE, Baroneſs DACRE *v.* MARY JANE ROPER Dowager Lady DACRE.

The Judgment of the Court in this caſe (*ante* 250.) was affirmed by the Court of *King's Bench*. (See 8 *Term Rep.* 112.)

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GOODTITLE on the ſeveral demiſes of HOLFORD, JERVOISE, and CAVE, Bart. *v.* OTWAY.

The Judgment of the Court in this caſe (*ante* 576.) was affirmed by the Court of *King's Bench*. (See 7 *Term Rep.* 399.)

The following Rule of Court was omitted to be inſerted in its proper order.

Michaelmas Term, 37 GEORGE III.

Thurſday, 10th *November*.

IT IS ORDERED, that from henceforth all perſons who ſhall become ſpecial bail for any Defendant or Defendants in this Court may be permitted to juſtify themſelves in open Court, although ſuch perſons did not actually become bail before the time that notice for their juſtification was delivered to the Plaintiff's attorney or agent, any Rule of this Court to the contrary notwithſtanding.

JAMES EYRE.
F. BULLER.
J. HEATH.
G. ROOKE.

AN

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4. And a ſupplemental affidavit was refuſed. *ib.*

5. Bailable proceſs was ſued out previous to the paſſing of 37 *Geo.* 3. *c.* 45. which regulates the form of the affidavit to hold to bail; this proceſs was renewed four ſeveral times without any new affidavit, and the fourth renewal on which the Defendant was arreſted, was ſubſequent to the paſſing of the above act; and held no objection to ſuch proceſs that it was founded on an affidavit not complying with the 37 *Geo.* 3. *c.* 45. *Crooks, One, &c.* v. *Holditch*, *M.* 38 *Geo.* 3. 176

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7. An affidavit to hold to bail, ſtating that *J. S.* has made no tender to pay in notes of the bank of *England*, excludes the poſſibility of any other perſon having tendered for him, and ſufficiently complies with 37 *Geo.* 3. *c.* 45. *ſ.* 9. *Wyatt and Others* v. *Smee*, *M.* 39 *Geo.* 3. 344

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TRADE, No. 1, 2.

ANNUITY,

See COSTS, No. 9.

1. If an annuity deed contain a proviſo that the grantor ſhall repurchaſe, the memorial of ſuch deed muſt ſtate the proviſo and the terms and conditions of redemption: if it only refer to the deed, and ſtate the annuity to be redeemable "on ſuch notice, terms, and conditions as are therein expreſſed," it does not ſufficiently comply with the 17 *Geo.*

17 *Geo.* 3. *c.* 26. *ſ.* 1. *ex parte Anſell and Another*, *T.* 37 *Geo.* 3. *Page* 62

2. If any part of the conſideration of an annuity be paid in *country bank* notes, the dates and times of payment muſt be ſet out in the memorial under 17 *Geo.* 3. *c.* 26. *Morris* v. *Wall*, *H.* 38 *Geo.* 3. 208
3. An annuity memorial, ſtating that the conſideration money was paid to *A. B.* and *C.* " ſome or one of them," is bad: though it appear that the money was paid on the day on which the deed was executed by them all. *Vaux* v. *Anſell*, *E.* 38 *Geo.* 3. 224
4. If ſeveral perſons who have purchaſed annuities of *A.* agree to give up thoſe annuities on receiving a certain ſum of money, and a bond payable at a future day, they retaining their annuity ſecurities till the bond becomes payable, the Court cannot under 17 *Geo.* 3. *c.* 26. order any of the ſecurities ſo retained to be delivered up though they may be void. Sir *Harry Goring*, Bart. v. *Welles*, Clerk, *E.* 39 *Geo.* 3. 395
5. At leaſt not unleſs the creditors attempt to ſet them up again as annuity ſecurities on non-payment of the ſtipulated ſum, or the bond proving bad. *ib.*
6. *Semb.* That after payment of the money and delivery of the bond to the creditors, their debt is ſatisfied, whether the bond prove good or bad. *ib.*
7. If a bond and warrant of attorney given to ſecure an annuity, be no otherwiſe noticed in the memorial than by way of recital in the annuity deed which is ſet out, it is not a ſufficient compliance with 17 *Geo.* 3. *c.* 26. *Van Braam* v. *Iſaacs*, *T.* 39 *Geo.* 3. 451
8. Nor can the Court refuſe to interfere on the ground of eighteen years having elapſed ſince the grant, and the grantee being dead. *ib.*
9. The Court cannot order an annuity bond to be delivered up to be cancelled for want of a memorial, purſuant to 17 *Geo.* 3. *c.* 26. though it be void by the firſt ſection of that act. *Symonds et Ux.* v. *Cobourne*, *E.* 36 *G.* 3. 482
10. *Qu.* Whether in ſuch a caſe they would ſtay proceedings on the bond? *ib.*

APPEARANCE,

See Bail.
Practice, No. 23.

APPURTENANCES,

See Devise, No. 1, 2, 3.
Way, Right of, No. 1.

ARBITRATION,

See Attachment, No. 2, 3.
Costs, No. 1. 5.
Practice, No. 5. 7. 43.

1. The Court will not ſet aſide an award on the ground of the witneſſes not having been examined on oath, if no ſuch objection was made at the time of their examination. *Ridoat* v. *Pye*, *M.* 38 *Geo.* 3. *Page* 91
2. It is no ground for ſetting aſide an award that one of the Defendant's witneſſes was re-examined by the arbitrator after the evidence was cloſed on both ſides, and the Plaintiff's attorney gone, though by a different teſtimony from what he gave at firſt the arbitrator's opinion were influenced. *Atkinſon* v. *Abraham*, *M.* 38 *Geo.* 3. 175
3. Unleſs ſuch re-examination appear to have been brought about by the management of the Defendant's attorney. *ib.*

ASSIGNMENT,

1. There is no fraud in the aſſignee of a term aſſigning over his intereſt to whom he pleaſes, with a view to get rid of the leaſe, although ſuch perſon neither takes actual poſſeſſion nor receives the leaſe. *Taylor* v. *Shum and Others*, *E.* 37 *Geo.* 3. 21

ASSUMPSIT,

See Money had and received.

ATTACHMENT,

See Costs, No 5.
Execution.
Practice, No. 5.
Prisoner, No. 5.
Venditioni exponas, No. 1.

1. Where a rule to bring in the body expires on the laſt day in the Term, the Plaintiff may at the riſing of the Court on that day move for an attachment for not bringing the body into Court, and ſuch attachment

may iſſue on the following day provided bail ſhall not then be perfected, or the Defendant rendered in diſcharge thereof. *Reg. Gen. Trin.* 38 *Geo.* 3. *Page* 312

2. An attachment for non-payment of a ſum of money purſuant to an award, cannot iſſue before a perſonal demand has been made. *Brandon* v. *Brandon, E.* 39 *Geo.* 3. 394

3. Even though the time and place for the payment of the money be ſpecified in the award. *ib.*

4. No rule for an attachment ſhall be abſolute in the firſt inſtance. *Chaunt* v. *Smart, E.* 36 *Geo.* 3. 477

5. Except for non-payment of coſts upon the prothonotary's *allocatur*. *ib.*

ATTORNEY,

See Courts, No. 5.
Practice, No. 32.

1. The Court will not diſcharge an attorney on a common appearance, unleſs he ſhew that he has practiſed within the ſpace of a year. *Dyſon* v. *Birch, One, &c. E.* 37 *Geo.* 3. (*Vid. et. Brooke* v. *Bryant*, 7 *Term Rep.* 25.) 4

2. *Qu.* If he ſhould not alſo ſtate that he has had a certificate under 25 *Geo.* 3. *c.* 80. within that time? 5

3. Delivery of an attorney's bill is concluſive evidence on a taxation by the prothonotary againſt an increaſe of charge in a ſubſequent bill on any of the items contained in the firſt, and ſtrong preſumptive evidence againſt any additional items. *Loveridge* v. *Botham, E.* 37 *Geo.* 3. 49

4. One admitted an attorney of *C. B.* (unleſs an attorney of *K. B.* or Solicitor of Chancery or *Exchequer*) muſt file his articles of clerkſhip with the ſecondary, together with affidavits of execution, due ſervice and notices. *Regula Generalis, T.* 37 *Geo.* 3. 90

ATTORNMENT,

See Administration, No. 2.

AVOWANT,

See Replication, No. 1, 2.

AVOWRY,

See Costs, No. 7, 8.

AUCTION,

See Frauds, Statute of, No. 2.

AUDITA QUERELA,

See Bankrupt, No. 11, 12, 13.

1. The Court will always give relief in a ſummary way, where a party would be intitled to it on an *auditâ querelâ*. *Liſter, One, &c.* v. *Mundell, E.* 39 *Geo.* 3. *Page* 427

AUTHORITY,

1. If a power of a public nature be committed to ſeveral who all meet for the purpoſe of executing it, the act of the majority will bind the minority. *Grindley and Another* v. *Barker and Others, E.* 38 *Geo.* 3. 229

AWARD,

See Arbitration.

B

BAIL,

See Affidavit to hold to bail, No. 2.
Attorney, No. 1.
Bail Bond.
Bankrupt, No. 10.
Foreign Laws, No. 1.
Pleading, No. 21, 22, 23.

1. The Court will not diſcharge a Defendant on a common appearance under the 34 *G.* 3. *C.* 9. *S.* 7. on the ground of the Plaintiff's reſidence in *Holland*. *Pieters and Another* v. *Luytjes, E.* 37 *Geo.* 3. 1

2. A Frenchwoman and her huſband come over to *England*, the huſband gives her a power of attorney to tranſact his buſineſs, and goes to *Hamburgh*, ſhe cohabits with another man, and trades on her own account with the Plaintiff by whom ſhe is arreſted: under theſe circumſtances the Court will not diſcharge her on a common appearance on the ground of her coverture, although the Plaintiff appear to have been acquainted

acquainted with it. *De Gaillon* v. *V. H. L'Aigle*, *E.* 37 *Geo.* 3. *Page* 8

3. It is no objection to bail that they are indemnified. *Neat* v. *Allen*, *E.* 37 *Geo.* 3. 21

4. Where bail are oppoſed and rejected and the Defendant is ſurrendered on the next day, he may juſtify new bail without paying the coſts of the former oppoſition. *Holward* v. *André*, *E.* 37 *Geo.* 3. 32

5. If the principal be ſurrendered within four days after the return of that writ, in which there is an effectual proceeding, it is ſufficient. Thus, if bail be ſerved with proceſs on his recognizance, and die before the *quarto die poſt*, and freſh proceſs iſſue againſt his executors, they have until the *quarto die poſt* of the ſecond writ to ſurrender the principal. *Meddowſcroft, One, &c.* v. *Sutton and Another*, *T.* 37 *Geo.* 3. 61

6. Bail are not permitted to juſtify who have been indemnified by the Defendant's attorney. *Reg. Gen. H.* 37 *Geo.* 3. 103

7. The Court rejected bail who had received a verbal promiſe of indemnity from the Defendant's attorney, but gave time to put in freſh bail. *Greenſill* v. *Hopley*, *M.* 38 *Geo.* 3. 103

8. Where bail in *C. B.* is taken under a judge's order, each of the bail is liable to double the ſum ordered, as well as to double the ſum ſworn to, when taken by affidavit. *Dahl* v. *Johnſon*, *H.* 38 *Geo.* 3. 205

9. The Court will not permit a Defendant to juſtify bail after an action for an eſcape commenced againſt the Sheriff, who has neglected to take a bail bond. *Webb* v. *Matthew*, *E.* 38 *Geo.* 3. 225

10. It is unneceſſary to give bail in error on a judgment in debt, unleſs it appear that the action was brought on a ſpecific contract. *Ablett* v. *Ellis*, *E.* 38 *Geo.* 3. 249

11. If a Defendant be arreſted by proceſs of *K. B.* and removed by *habeas corpus* to *C. B.* he may put in and juſtify bail in either Court. *Knowlys and Another* v. *Reading*, *Trin.* 38 *Geo.* 3. 311

12. Bail were allowed to juſtify after the rule on the Sheriff to bring in the body had expired, on payment of the coſts of the oppoſition. *Weddall* v. *Berger*, *M.* 39 *Geo.* 3. *Page* 325

13. If a man carry on his buſineſs at a lodging in one place, and keep a houſe at another, notice of bail deſcribing him as of the former place is ſufficient. *ib.*

14. The Court allowed the Defendant to juſtify bail after an attachment had iſſued againſt the Sheriff, but gave leave to the Plaintiff to oppoſe them without prejudice. *Williams* v. *Waterfield*, *M.* 39 *Geo.* 3. 334

15. Where bail are regularly put in and excepted to the Defendant need not deſcribe them in his notice of juſtification. *England* v. *Kerwan*, *M.* 39 *Geo.* 3. 335

16. The Court will not diſcharge a Defendant on a common appearance on the ground of infancy. *Madox* v. *Eden*, *E.* 36 *Geo.* 3. 480

17. A Defendant cannot enter into the recognizance of bail. *Reg. Gen. E.* 36 *Geo.* 3. 660

18. But each of his bail ſhall bind himſelf in double the ſum ſworn to. *ib.*

BAIL BOND,

See PRACTICE, No. 8.

1. If a Defendant ſurrender himſelf, it is a ſufficient performance of the condition of the bail bond without putting in bail. *Maddocks and Another* v. *Bullcock*, *M.* 39 *Geo.* 3. 325

2. But he muſt give notice of ſuch ſurrender. *ib.* *ib.*

3. If bail be put in without any deſcription, one of whom proves to be clerk to an attorney, and the other a perſon in a low ſituation, Plaintiff may take an aſſignment of the bail bond. *Fenton* v. *Ruggles*, *M.* 39 *Geo.* 3. 356

BAIL PIECE,

1. The Court will give leave to amend a miſnomer

miſnomer in the bail piece. *Anderſon* v. *Noah*, *E.* 37 *Geo.* 3. Page 31

BANK ACT,

See Affidavit to hold to bail, No. 5. 7.
Practice, No. 9, 10.

1. An affidavit to hold to bail made in *Ireland* two days only after the paſſing of 37 *Geo.* 3. *c.* 45. having omitted to comply with the proviſions of that act, a common appearance was allowed. *Stewart* v. *Smith*, *M.* 38 *Geo.* 3. 132. n.
2. And a ſupplemental affidavit was refuſed. *ib.*

BANKER,

See Consignments.
Partners, No. 1, 2.
Bills of Exchange, No. 3.

BANKRUPT,

See Composition, Deed of, No. 1.
Costs, No. 1.
Partners, No. 1, 2.
Prisoner, No. 2, 3.

1. If an order for the delivery of goods in the hands of a third perſon be given to an uncertificated bankrupt in payment of a debt accrued ſubſequent to his bankruptcy, he may maintain trover for them. *Fowler* v. *Down*, *E.* 37 *Geo.* 3. 44
(*Vid. et. Webb.* v. *Fox*, 7 *Term Rep.* 391.)
2. If the furniture of a coffee-houſe be taken in execution by a creditor, and without being removed be let by him to the keeper of the coffee-houſe, who becomes bankrupt while in poſſeſſion of it, the aſſignees may ſeize it under the 21 *Jac.* 1. *c.* 19. *ſ.* 11. *Lingham* v. *Biggs and Another*, *T.* 37 *Geo.* 3. 82
3. If a man be the reputed owner of goods, and appear to have the order and diſpoſition of them, he muſt be underſtood to have taken upon himſelf "the ſale, order, and diſpoſition," within the meaning of 21 *Jac.* 1. *c.* 19. *ſ.* 11. 87
4. Poſſeſſion of chattels with nothing to oppoſe it, is always evidence of ownerſhip; but ſuch evidence as may be oppoſed. *ib.* Page 88
5. *A.*, a dyer, having purchaſed a plant of *B.*, and being unable to pay the purchaſe-money, re-ſold it to *B.*, who never took actual poſſeſſion, but demiſed it to him for three years; during that time *A.* became bankrupt, and the aſſignees having ſeized the plant in his poſſeſſion under 21 *Jac.* 1., it was held a good defence to an action of trover brought againſt them by *B.* *Bryſon* v. *Wylie*, *H.* 24 *Geo.* 3. *B. R.* 83. n.
6. If any one of the creditors, though without the privity of the bankrupt, be induced by money to ſign the certificate, it is void. *Holland* v. *Palmer*, *M.* 38 *Geo.* 3. 95
7. If a Plaintiff become bankrupt after a non-ſuit at *Niſi Prius*, and before the judgment of non-ſuit, the coſts of the non-ſuit are a debt proveable under the commiſſion. *Watts* v. *Hart*, *M.* 38 *Geo.* 3. 134
8. It is no objection to a commiſſion of bankruptcy that it was ſued out with intent to defeat a previous execution, if no colluſion appear on the part of the bankrupt. *Menham*, *Aſſignee*, &c. v. *Edmonſon*, *H.* 39 *G.* 3. 369
9. If a creditor accompany the Sheriff's officer in levying an execution which is afterwards avoided by a commiſſion of bankruptcy, trover may be maintained againſt the former by the aſſignee, though he has never received either the goods or their value from the Sheriff. *ib.* *ib.*
10. The Court will not order a common appearance to be entered on the ground of the Plaintiff having proved his debt, and been choſen aſſignee under a commiſſion of bankruptcy iſſued againſt the Defendant. *Hill* v. *Reeves*, *E.* 39 *Geo.* 3. 424
11. If a *fi. fa.* iſſued againſt a bankrupt before certificate obtained be not executed till after, the Court will order the goods to be reſtored, even though he has not pleaded his certificate according to 5 *Geo.* 2. *c.* 30. *ſ.* 7. *Liſter*, *One*, &c. v. *Mundell*, *E.* 39 *Geo.* 3. 427
12. For the Court will always give that relief in a ſummary way, which might be obtained by *auditâ querelâ*. *ib.*

13. But

13. But if any thing be alleged to invalidate the effect of the certificate, the Court will direct a trial on the plea of bankruptcy. *Liſter, One, &c.* v. *Mundell, E.* 39 *G.* 3. *Page* 427

14. An action againſt a bankrupt who has obtained his certificate under a ſecond commiſſion, on a cauſe of action accruing previous to his ſecond bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 *Geo.* 2. *c.* 30. *ſ.* 37. is elapſed, if evidence be adduced to ſhew that it is not probable from the ſtate of the effects in the hands of the aſſignees, that the bankrupt will be able to pay 15*s.* in the pound. *Jelſs* v. *Ballard, T.* 39 *Geo.* 3. 467

BANKRUPTCY, Plea of,

See PLEADING, No. 21, 22, 23.
PRACTICE, No. 3.

BARON AND FEME,

See BAIL, No. 1. POWER, No. 1.

1. Defendant's wife having committed adultery, he left her in his houſe with two children bearing his name, but without making any proviſion for her in conſequence of the ſeparation; ſhe continued in a ſtate of adultery: held that the huſband ſhould be liable for neceſſaries furniſhed to her unleſs it appeared that the Plaintiff knew or ought to have known the circumſtances under which ſhe was living. *Norton* v. *Fazan, E.* 38 *Geo.* 3. 226

2. It ſeems that a woman living apart from her huſband in a ſtate of adultery, is liable on her own contracts, though ſhe has no ſeparate maintenance. *Cox* v. *Kitchin, M.* 39 *Geo.* 3. 338

3. If the huſband reſide abroad, and the wife trade and obtain credit in this country as a feme ſole, ſhe is liable for her own debts. *De Gaillon* v. *L'Aigle, M.* 39 *Geo.* 3. 357

BILL, Delivery of,

See ATTORNEY, No. 3.

BILL OF EXCEPTIONS,

1. A bill of exceptions being no part of the record in the Court below, is not to be included in the taxation of coſts there. *Gardner* v. *Baillie, E.* 37 *Geo.* 3. *Page* 32

BILL OF LADING,

See CONSIGNMENT, No. 1.

BILL OF PARTICULARS,

See PRACTICE, No. 35.

BILLS OF EXCHANGE AND PROMISSORY NOTES,

See PARTNERS, No. 1, 2.
PLEADING, No. 25.

1. A note payable on demand with intereſt, drawn by *A.* in favour of *B.* as a ſecurity for a debt, was by him indorſed to *C.* for the ſame purpoſe: after the indorſement, it paſſed backwards and forwards between *B.* and *C.* ſeveral times, and previous to its being ultimately depoſited with *C.* he received an intimation from *B.* not to negotiate it, as the latter would want it when he ſettled accounts with *A.*; held that *C.* could not, after a ſettlement of accounts between *A.* and *B.* without a re-delivery of the note, recover on it againſt *A.* *Roberts and Others, Aſſignees, &c.* v. *Eden, E.* 39 *Geo.* 3. 398

2. For it was depoſited as a pledge, and therefore ſubject to the ſame equity as if remaining in the hands of the original payee. *ib.* *ib.*

3. If *A.* depoſit bills indorſed in blank with *B.* his banker, to be by him received when due, and the latter raiſe money upon the bills by pledging them with *C.* another banker, and afterwards become bankrupt; *A.* cannot maintain trover againſt *C.* for the bills. *Collins* v. *Martin, H.* 37 *Geo.* 3. 648

4. Notice of non-payment of a bill by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former; though the indorſer have. *Walwyn* v. *St. Quintin, H.* 37 *Geo.* 3. 652

5. If the holder, after proteſt for non-payment and notice to the drawer, forbear to ſue the acceptor, the drawer is not thereby diſcharged. *Walwyn* v. *St. Quintin*, *H.* 37 *Geo.* 3. *Page* 652

6. So after proteſt only, if the drawer be not entitled to notice. *ib.* *ib.*

7. *Secus*, before proteſt, or if the holder take ſecurity from the acceptor after proteſt. *ib.* *ib.*

8. If the holder accept part-payment of the indorſer, he may ſtill recover the reſidue againſt the drawer; if not the whole. *ib.* *ib.*

BISHOP,

See Prohibition, No. 1, 2, 3, 4.

BOND,

See Condition, No. 1, 2.
Executors and Administrators, No. 4.
Evidence, No. 5, 6.
Illegal Contract, No. 5.
Pleading, No. 26, 27.
Replevin, No. 2. 4.

1. The Court will ſtay proceedings on a ſingle bond on payment by the obligor of principal and coſts, without intereſt. *Hogan* v. *Page*, *M.* 39 *Geo.* 3. 337

2. If the obligor of a bond after notice of its being aſſigned, take a releaſe from the obligee, and plead it to an action brought by the aſſignee in the name of the obligee, the Court will ſet the plea aſide. *Legh* v. *Legh*, *T.* 39 *Geo.* 3. 447

3. Nor will they under theſe circumſtances allow the obligor to plead payment of the bond. *ib.* *ib.*

BRIBERY,

See Treating Act, No. 1.

BYE LAW,

See Pleading, No. 13, 14.

C

CANAL ACT,

See Coſts, No. 7.

CERTIFICATE,

See Attorney, No. 2.
Bankrupt, No. 6.

CESTUY QUE TRUST,

See Pleading, No. 5.

CLAIM,

See Toll.

COGNIZANCE,

See Replevin, No. 1, 2.

COMMON,

1. If the lord of the manor plant trees on a common, the commoner has no right to abate them, though there be not a *ſufficiency* of common left: his remedy is by action. *Kirby* v. *Sadgrove*, *in Error*, *E.* 37 *Geo.* 3. *Page* 13

2. But if the lord ſo plant as to *deſtroy* the common, ſuch an act would be conſidered as a nuiſance, and the commoner might abate. *ib.* *ib.*

COMMON RECOVERY,

1. It is no objection to the paſſing a common recovery that the order of the names of the vouchees in the *præcipe* at bar, varies from that in the *dedimus*. *Lang* v. *Woodhouſe*, *E.* 37 *Geo.* 3. 31

2. Nor that the warrants of attorney of the ſeveral vouchers are on ſeparate pieces of parchment. *ib.* *ib.*

3. The Court will give leave to amend a miſtake in the writ of entry in a common recovery. *Croſs* v. *Pead*, *M.* 38 *Geo.* 3. 137

4. No common recovery or fine ſhall be ſuffered to paſs unleſs the taking of the warrants of attorney be before one of the Juſtices or Barons of the Courts at *Weſtminſter*, or one of the Serjeants at Law, unleſs an affidavit be filed ſtating that the commiſſioners taking the ſame, are, to the beſt of the Defendant's information and belief, either barriſters of five years ſtanding, or ſolicitors or attorneys of ſome of the Courts at *Weſtminſter*, the Judges of the Court of Seſſion and

and Exchequer, or advocates and clerks to the ſignet of five years ſtanding in *Scotland*. *Reg. Gen. M.* 39 *Geo.* 3. *Page* 362

COMPOSITION, Deed of,

1. The creditors of a bankrupt entered into a deed of compoſition to receive 8 *s.* in the pound in full diſcharge of their debts, and agreed to releaſe every thing beyond that to the bankrupt, and join in a petition to the Chancellor to ſuperſede the commiſſion; one of the creditors having two diſtinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8 *s.* in the pound on both debts, and then recovered on ſome of the bills; held that the bankrupt was entitled to ſue for the money ſo obtained on the bills in an action for money had and received. *Stock* v. *Mawſon, Trin.* 38 *Geo.* 3. 286

CONDITION,

See PLEADING, No. 26, 27.

1. If the condition of a bond be to render a perſon in execution who has once been diſcharged, it is void. *Da Coſta* v. *Davis, E.* 38 *Geo.* 3. 242

2. If a condition be to do one of two things, and one become impoſſible, it is no excuſe for not performing the other. *ib.* *ib.*

CONSIGNMENT,

1. *A.* of *Liverpool*, wiſhing to draw on the banking-houſe of *B.* in *London* to a large amount, agreed among other ſecurities given to conſign goods to a mercantile houſe, conſiſting of the ſame partners as the banking-houſe, though under the firm of *B.* and *C.*: accordingly he remitted the invoice of a cargo, and the bill of lading indorſed in blank to *B.* and *C.*; but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became bankrupt, being conſiderably indebted to *B.*, and the cargo was delivered to his aſſignees by the captain: held that *B.* and *C.* might maintain trover for it againſt the latter. *Haille* v. *Smith in Error, M.* 37 *Geo.* 3. 563

CONTRACT,

See EVIDENCE, No. 5.
ILLEGAL CONTRACT.

COPYHOLD,

See CUSTOM, No. 1.
PLEADING, No. 16.

CORPORATION,

See MISNOMER, No. 1, 2, 3.
PLEADING, No. 13.
TOLL.

COSTS,

See BAIL, No. 4.
BANKRUPT, No. 7.
BILL of EXCEPTIONS.
PRACTICE, No. 2. 12.
REPLEVIN, No. 3.

1. The general term *coſts* in a rule of reference to arbitration does not include the coſts of that reference. *Bradley* v. *Tunſtow, E.* 37 *Geo.* 3. *Page* 34

2. A pauper as ſuch can never pay coſts. *Rice* v. *Brown, E.* 37 *Geo.* 3. 39

2. *Semble*, that he may receive them for the defaults of his opponent. *ib.* *ib.*

4. If he miſbehaves himſelf the Court will diſpauper him, and ſo make him liable to coſts. *ib.* *ib.*

5. If an arbitrator award among other things that each party ſhall pay a moiety of the coſts of the arbitration, and of making the ſubmiſſion a rule of Court, and one party in order to get the award out of the hands of the arbitrator pay the whole, he may have an attachment againſt the other party if he refuſe to pay his moiety. *Hicks* v. *Richardſon, M.* 38 *Geo.* 3. 93

6. The Court will not ſtay proceedings till ſecurity is given for the coſts in an action by a foreign ſeaman ſerving on board an *Engliſh* ſhip. *Jacobs* v. *Stevenſon, M.* 38 *Geo.* 3. 96

7. A rent charged on the rates by a canal act, as a compenſation for damage done to land, is not within the 11 *Geo.* 2. *c.* 19. *ſ.* 22. ſo as to entitle an avowant to double coſts.

coſts. *Leominſter Canal Company* v. *Cowell and Another*, H. 38 *Geo.* 3. *Page* 213

8. Nor is any rent charge. *ib.*

9. The Court ſet aſide a judgment and warrant of attorney, given to ſecure an annuity for a defect in the memorial without coſts, becauſe it was the caſe of an executor. *Dickenſon, Executor, &c.* v. *Boyne*, *M.* 39 *Geo.* 3. 335

10. *A.* ſued as executrix of *B.* on a policy effected by *B.* in his life-time, in which he was jointly intereſted with *C.* and *D.* now living; *A.* being non-ſuited, held that ſhe was entitled to the privilege of an executrix to be exempt from coſts. *Wilton, Executrix* v. *Hamilton*, *T.* 39 *Geo.* 3. 445

COVENANT,

See PAYMENT, No. 1.
PARTY WALL, No. 2.

1. If a leaſe for ninety-nine years, determinable on three lives, be conveyed in truſt for *A.* for life, and *A.* covenant to uſe his utmoſt endeavours as often as any of the perſons on whoſe lives the premiſes are held ſhall die, to renew the ſame by purchaſing of the lord of the fee a new life, in the room of ſuch as ſhall fail, it is no breach of the covenant, if upon one of the lives failing, he procure a renewal upon his own life. *Scudamore and Others* v. *Stratton and Others*, *T.* 39 *Geo.* 3. 455

2. Performance pleaded otherwiſe than in the terms of the covenant is bad even on general demurrer. *ib.* *ib.*

3. Under a covenant by a leſſee of a coalmine to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhall ſell for at the pit's mouth*, the leſſee was held liable to pay a moiety of the money, which the coals, though ſold elſewhere, would have produced at the pit's mouth. *Clifton* v. *Gerrard*, *H.* 36 *Geo.* 3. (Reverſed on error, 7 *Term Rep.* 676.) 522

COVERTURE,

See BAIL, No. 2.
BARON and FEME.

COURTS,

1. The Court will not refuſe leave to enter a ſuggeſtion under the 22 *Geo.* 2. c. 47. on the ground that a Court of Conſcience has no authority to try a queſtion of bankruptcy. *Keay* v. *Rigg*, *E.* 37 *Geo.* 3. *Page* 11

2. A Defendant is not liable to be ſued in the county court for a debt not ariſing within the county, though he be reſident therein. And a ſuggeſtion applied for on the ground of reſidence was refuſed. *Smith* v. *O'Kelly*, *T.* 37 *Geo.* 3. 75

3. The juriſdiction of the Court of Conſcience does not extend to contracts made on the high ſeas. *M'Collam* v. *Carr*, *E.* 38 *Geo.* 3. 223

4. The Court will not allow a ſuggeſtion for double coſts under 23 *Geo.* 2. *c.* 33. where the original debt being above 40*s.* has by a balance of accounts been reduced below that ſum. *ib.* *ib.*

5. If an attorney ſue as a common perſon, the Court will give the Defendant leave to plead that the cauſe of action aroſe within the juriſdiction of the Court of Requeſts, together with other matters. *Tagg* v. *Madan*, *H.* 37 *Geo.* 3. 629

CUSTOM,

See EVIDENCE, No. 8.
PLEADING, No. 16.

1. It ſeems that a cuſtom for the homage to aſſeſs a compenſation in lieu of a heriot to be paid by an in-coming copyholder on ſurrender or alienation is not good. *Parkin* v. *Radcliffe*, *T.* 38 *Geo.* 3. 282.

D

DECLARATION,

See PRISONER, No. 4.

DEED,

See COMPOSITION, Deed of, No. 1.
LEASE, No. 1.

DE INJURIA, &c. Plea of,

See PLEADING, No. 9, 10, 11, 12.

DEVASTAVIT,

See EXECUTOR and ADMINISTRATOR, No. 1.

DEVISE,

See WAY RIGHT of, No. 1.

1. Lands uſually occupied with a houſe will not paſs under a deviſe of "a meſſuage with the appurtenances," unleſs it clearly appear that the teſtator meant to extend the word "appurtenances," beyond its technical ſenſe. *Buck* d. *Whalley* v. *Nurton*, *T.* 37 *Geo.* 3. *Page* 53
2. But if that do appear, they may paſs. *ib.* 57
3. The word "appurtenances" will carry orchards. *ib.* *ib.*
4. *A.* deviſed all his freehold and leaſehold eſtates "to *B.* and the iſſue of her body as tenants in common, but in default of ſuch iſſue, or being ſuch if they ſhould all die under twenty-one and without leaving iſſue" then over; held that all the limitations ſubſequent to that to *B.* being contingent, the remainders in the freehold were barred by fine and recovery, but that the leaſehold veſted in the remainder-man on the death of *B.* without iſſue. *Burnſall* v. *Davy and Others*, *H.* 38 *Geo.* 3. 215
5. Teſtator deviſed "all his freehold leaſehold, &c. eſtates" to *A.* in fee, provided that if *B.* ſhall have "any ſon or ſons," then "to ſuch male iſſue as *B.* ſhall have when *A.* attains twenty-one," but *A.* to have the rents and profits of the eſtates till he attains twenty-one: by a ſubſequent clauſe he gave "all the reſidue of his real and perſonal eſtates whatſoever, not before diſpoſed of to *A.* his heirs, &c. for ever." *B.* had one ſon who died before *A.* attained twenty-one, and a ſecond who was born three weeks after that period. Held that the firſt ſon took nothing, but that the ſecond took an eſtate in tail male. *Whitelocke, Adminiſtrator, &c.* v. *Heddon and Others*, *E.* 38 *Geo.* 3. *Page* 243
6. Deviſe to the teſtator's ſeven ſiſters, ſhare and ſhare alike; on the death of any of them her ſhare to go to her firſt and other ſons in tail, and for *default of ſuch ſons*, to her daughters as tenants in common; in caſe of any of the ſeven ſiſters dying without iſſue, or ſuch iſſue dying under twenty-one, the ſurviving ſiſters to take her ſhare, and if all the ſiſters ſhould die without iſſue, or ſuch iſſue die under twenty-one, then over; held that the words for "default of ſuch ſons," did not make the remainder to the daughters contingent, which took effect notwithſtanding the birth of a ſon. *Doe* d. *Dacre* v. *Dacre*, *E.* 38 *G.* 3. (affirmed on error in *K. B.* 8 *Term Rep.* 112.) 250
7. Teſtator deviſed in fee to *P. D.* his brother for life, and after his deceaſe to *G. P.* his neice for life, then to truſtees to preſerve contingent remainders, and after the deceaſe of *P. D.* and *G. P.* "in truſt for the uſe of the firſt ſon of *G. P.* and his heirs, and for want of ſuch iſſue to the other ſons of his neice, and their heirs in ſucceſſion, and *for want of ſuch iſſue male*, then to the daughters of *G. P.* and for want of ſuch iſſue over; held that the words *for want of ſuch iſſue male*, made the remainder to the daughters contingent, and that it was therefore defeated by the birth of a ſon. *Keene* d. *Pinnock et ux.* v. *Dickſon*, *B. R. M.* 23 *Geo.* 3. 254 *n.*
8. Deviſe to *S. N.* ſon of *T.* and *M. N.* for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *S. N.* and their heirs male; for default of ſuch iſſue to the uſe of the daughters of *T.* and *M. N.* and for default of *ſuch* iſſue to the uſe of the right heirs of *T. N.* for ever; held that the word "ſuch" referred to the daughters of *T.* and *M. N.* before-mentioned only, and reſtrained the limitation to them to an eſtate for life. *Denn* d. *Briddon et ux.* v. *Page and Another*, *B. R. M.* 23 *Geo.* 3. 261 *n.*
9. *A.* after giving a life eſtate in certain copyholds

holds to *B*, deviſed as follows: "All the *reſt* of my lands, tenements, and *hereditaments*, either freehold or copyhold, whatſoever and whereſoever, and alſo all my goods, &c. *after payment of my juſt debts and funeral expences*, I give, deviſe, and bequeath the *ſame* unto my wife *S. C.*" held that under this deviſe *S. C.* took a fee. *Denn* d. *Mellor* v. *Moor in Error*, *M.* 37 *Geo.* 3. *Page* 558

10. *A.* ſeiſed in fee of the manors of *Stanford*, &c. and alſo of the manors of *Swinford* and *South Kilworth*, entered into marriage articles to ſecure a jointure to his intended wife upon the above eſtates, and to make proviſion for younger children, and agreed to ſettle the *Stanford* eſtate upon his eldeſt ſon in ſtrict ſettlement, ſubject to part of ſuch jointure and proviſion. He then deviſed thoſe eſtates in caſe he ſhould happen to die without iſſue, and ſubject to ſuch jointure as he might make, to the leſſors of the Plaintiff for five hundred years upon the truſts therein expreſſed. Afterwards by ſeparate deeds of leaſe and releaſe, he conveyed, firſt, the *Stanford* eſtate, to truſtees in fee, to the uſe of himſelf in fee till the marriage, with divers limitations in purſuance of the articles, and ſubject to a term of five hundred years for ſecuring part of his wife's jointure to the uſe of himſelf in fee; ſecondly, the *Swinford* and *South Kilworth* eſtates to truſtees in fee to the uſe of himſelf in fee till the marriage, to the uſe and intent that his intended wife ſhould take the other part of her jointure thereout if ſhe ſurvived him, and after his death, remainder to truſtees for five hundred years to ſecure ſuch jointure, remainder to himſelf in fee. He afterwards married and died without iſſue. Held that the will was revoked as to both eſtates by the deeds of ſettlement, though they were conſiſtent with the proviſions of the will, and though the deviſor took back the eſtate, he parted with by the ſame inſtruments. *Goodtitle* d. *Holford and Others* v. *Otway*, *M.* 37 *Geo.* 3. 576

11. Held alſo, that the latter eſtate was not excepted from this revocation by the circumſtance of the conveyance of that eſtate to the truſtees being merely for the purpoſe of creating a term to ſecure the wife's jointure. *Goodtitle*, d. *Holford and Others* v. *Otway*, *M.* 37 *Geo.* 3. *Page* 576

DISCONTINUANCE.

1. Aſſumpſit againſt three; two pleaded a debt of record by way of ſet-off; the Plaintiff replied *nul tiel record*, and gave a day to the two Defendants, but entered no ſuggeſtion reſpecting the third; held on demurrer, that the action being diſcontinued, judgment muſt be given againſt the Plaintiff, even though the Defendants' plea were bad. *Tippet and Others* v. *May and two Others*, *E.* 39 *Geo.* 3. 411

DISTRINGAS,

See Practice, No. 4. 15.

1. If a diſtringas be returnable, on the laſt day of Term, the Plaintiff at the riſing of the Court may move to increaſe iſſues on the *alias* or *pluries diſtringas* to be iſſued thereupon on the following day, in caſe no appearance ſhall then have been entered. *Reg. Gen. Trin.* 38 *Geo.* 3. 312
2. So where iſſues have been levied on ſuch *diſtringas*, he may at the riſing of the Court, move for leave to ſell the iſſues to pay the coſts of the *diſtringas*. *ib.* *ib.*

DISTURBANCE,

See Market, No. 1, 2.
Toll.

E

EAST INDIA COMPANY,

See Trade.
Illegal Contract, No. 5.

1. The excluſive right of trading to the *Eaſt Indies* granted to the *Eaſt India* Company by 9 & 10 *Will.* 3. has never been put an end to, and every infringement of it is a public wrong. *Camden and Others* v. *Anderſon in Error*, *E.* 38 *Geo.* 3. 272
2. Though ſuch parts of 9 & 10 *Will.* 3. as inflicted

inflicted penalties, *&c.* were repealed by 33 *Geo.* 3. *c.* 52, and though the latter act ſays, that "no acts, or parts of acts thereby repealed, ſhall be pleaded or ſet up in bar of any action," *&c.* yet it is competent to under-writers who have ſubſcribed policies on ſhips trading to the *Eaſt Indies* in contravention of 9 & 10 *Will.* 3. to avail themſelves of the illegality of ſuch trading, in an action brought on the policies. *Camden and Others* v. *Anderſon in Error, E.* 38 *Geo.* 3. *Page* 272

EAST INDIES,

See India.

EJECTMENT,

See Practice, No. 34. 36, 37.

If a declaration in ejectment be ſerved upon a tenant, and his landlord be admitted to defend, the Plaintiff can only recover ſuch premiſes as the tenant is proved to be in poſſeſſion of. *Fenn* d. *Blanchard* v. *Wood, M.* 37 *Geo.* 3.

ELECTIONS,

See Treating Act, No. 1.

ERROR,

See Bail, No. 10.
Exchequer Chamber, Court of.

ERROR, Writ of

See New Trial, No. 1.
Prisoner, No. 2.
Supersedeas.

ESCAPE,

See Evidence, No. 3, 4. 9.
Pleading, No. 19, 20.

1. If a Sheriff's officer having taken a priſoner in execution permit him to go about with a follower of his before he take him to priſon, it is an eſcape. *Benton* v. *Sutton, E.* 37 *Geo.* 3. 24
2. *Qu.* Whether it would not have been an eſcape alſo if the officer himſelf had accompanied him? *ib.* *ib.*

EVIDENCE,

See Ejectment, No. 1.
Inquiry, Writ of, No. 2.
New Trial, No. 3.
Variance, No. 6.

1. Delivery of an attorney's bill is concluſive evidence, on a taxation by the prothonotary, againſt an increaſe of charge in a ſubſequent bill on any of the *items* contained in the firſt; and ſtrong preſumptive evidence againſt any additional *items.* *Loveridge* v. *Botham, E.* 37 *Geo.* 3. *Page* 49
2. In an action on an attorney's bill, the *Niſi Prius* roll is good *primâ facie* evidence that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb* v. *Pritchett, E.* 38 *Geo.* 3. 263
3. In eſcape againſt the Sheriff if the Plaintiff aver in his declaration that *J. S.* was arreſted "under a writ indorſed for bail by virtue of an affidavit now on record," he muſt produce the affidavit in evidence, though the latter part of the averment was unneceſſary. *Webb* v. *Herne and Another, Sheriff of Middleſex, T.* 38 *Geo.* 3. 281
4. *Secus* if the declaration only ſtate that a writ was ſued out, indorſed for bail. *Semb. ib.* 282
5. If the abandonment of a contract be made the ground of an action, it is not competent to the Plaintiff to ſhew that a contract has exiſted and been abandoned without proving the ſpecific contract. *Walker* v. *Conſtable, T.* 38 *Geo.* 3. 306
6. In debt on bond, if one of the atteſting witneſſes be dead, and the other beyond the proceſs of the Court, it is ſufficient to prove the hand-writing of the witneſs that is dead. *Adam and Wife, Executrix* v. *Kerr, M.* 39 *Geo.* 3. 360
7. *Qu.* Whether evidence of a cuſtom in *Jamaica* to execute bonds by ſubſtituting a mark with a pen for a ſeal, be admiſſible in ſupport of a declaration on a bond *ſealed, &c.*? *ib.* 360
8. Evidence that the homage have been accuſtomed to aſſeſs a certain ſum of money

as a heriot upon alienation, and that ſuch aſſeſſment has always been made with reference to the beſt chattel of the tenant, will not ſupport an avowry for a heriot in kind upon alienation. *Parkin* v. *Radcliffe*, *E.* 39 *Geo.* 3. 393

9. Evidence of a cuſtom for the lord to have the beſt beaſt or good on the tenant's death, will not ſupport a juſtification by him for taking the beſt beaſt. *Adderly* v. *Hart*, *T.* 4 *Geo.* 1. 394

10. To debt for an eſcape, Defendant pleaded a voluntary return and ſafe keeping ſince; Plaintiff in his replication admitted the voluntary return, but alleged that afterwards, and after notice of the eſcape, the priſoner eſcaped again; this the Defendant traverſed: Held, that it was not ſufficient for the Plaintiff merely to prove a notice of eſcape and ſubſequent eſcape, but that he muſt alſo, in order to maintain the action, prove the firſt eſcape alleged in his declaration. *Griffiths* v. *Eyles*, *E.* 39 *Geo.* 3. 418 n.

11. Evidence that the pariſhioners have treated with the proprietor of tithes for a compoſition is not alone ſufficient to eſtabliſh his poſſeſſion of the tithes in an action on the 2 & 3 *Ed.* 6. *c.* 13. *Wyburd* v. *Tuck*, *T.* 39 *Geo.* 3. 458

EXCHEQUER CHAMBER, COURT OF.

1. The Court of Exchequer Chamber will allow intereſt to a Defendant in Error under 3 *H.* 7. *c.* 10. on a judgment of *non pros*, as well as on a judgment of affirmance. *Sykes* v. *Harriſon in Error*, *E.* 37 *Geo.* 3 29

2. For the future the intereſt allowed will be 5*l.* *per Cent.* inſtead of 4*l.* *ib.* 30

3. Where judgment for the Defendant on a ſpecial verdict is reverſed in the Exchequer chamber that Court on motion will give a final judgment for the Plaintiff. *Denn ex dem. Mellor* v. *Moore in Error*, *E.* 37 *G.* 3. 30

EXCISE,

1. An exciſe officer ſeizing ſoap in the execution of his office at any diſtance from the ſea, is within the protection of 24 *Geo.* 3. *Seſſ.* 2. *c.* 47. *ſ.* 15. *The King* v. *Brady and Others*, *M.* 38 *Geo.* 3. *Page* 187

2. Nor need he have a warrant to ſeize the ſoap *in tranſitu*, if liable to forfeiture. *ib.*

EXECUTION,

See PRISONER, No. 1, 2.

1. An attachment for non-payment of money is an execution. *The King* v. *Davis*, *One*, &c. *M.* 39 *Geo.* 3. 336

2. If a *fi. fa.* be *teſte*'d before Defendant's death, but delivered to the Sheriff and executed after, the execution is regular. *Waghorne* v. *Langmead*, *M.* 37 *Geo.* 3. (*Vid. et. Bragner* v. *Langmead*, 7 *Term Rep.* 20.) 571

3. Same point. *Gill* v. *Parſons*, 13 *W.* 3. *B. R.* (Same caſe, 7 *Term Rep.* 21. n.) 572

EXECUTOR AND ADMINISTRATOR,

See ADMINISTRATION, No. 1, 2.
BAIL, No. 5.
COSTS, No. 9, 10.

1. If an executrix uſe the goods of her teſtator as her own, and afterwards marry, and then treat them as the goods of her huſband, ſhe ſhall not be allowed to object to their being taken in execution for her huſband's debt. *Quick et ux.* v. *Sir Wm. Staines, Knt. Sheriff*, *T.* 38 *Geo.* 3. 293

2. An outſtanding judgment againſt a teſtator or inteſtate not docketed according to the directions of the 4 & 5 *Will. & Mary*, *c.* 20. cannot be pleaded by an executor or adminiſtrator to an action on ſimple contract. *Steele* v. *Rorke, Adminiſtratrix*, *T.* 38 *Geo.* 3. 307

3. *Qu.* Whether an executor can maintain treſpaſs for trees cut down in the life time of his teſtator? *Williams, Executor* v. *Breedon*, *Mich.* 39 *Geo.* 3. 329

4. If the obligee in a joint and ſeveral bond make one of two obligors his executor with others, the action on the bond is diſcharged as to both obligors. *Cheetham* v. *Ward*, *H.* 37 *Geo.* 3. 630

EXTINGUISHMENT,

See Executors and Administrators, No. 4.
Way, Right of, No. 1.

F

FACTOR,

See Consignment.
Bills of Exchange, No. 3.
Partners, No. 1, 2.

FEME,

See Bail, No. 2.
Baron and Feme.
Power, No. 1.

FINE,

See Common Recovery, No. 4.

1. No fine which appears to have been acknowledged more than twelve months, can paſs the King's ſilver office without a rule of Court or Judge's order. *Reg. Gen. E.* 36 *Geo.* 3. *Page* 530
2. In ſuch caſe, if the conuſors be living, an affidavit muſt be made thereof. *ib.* *ib.*
3. If dead, the affidavit muſt ſtate the time of their death. *ib.* *ib.*
4. And the application for a rule or order that the fine may paſs the King's ſilver office ſhall be made to the Court on motion if in Term time, if in vacation to a Judge at Chambers; and the rule or order muſt be filed with the *præcipe* and concord at the King's ſilver office. *ib.* *ib.*

FOREIGN LAWS.

If a Defendant be held to bail in this country on an inſtrument entered into in *France*, by which inſtrument his property only, and not his perſon was, according to the law of *France* made liable, the Court on motion will diſcharge him on his entering a common appearance. *Melan* v. *The Duke de Fitzjames*, *M.* 38 *Geo.* 3. 138

FOREIGNER,

See Costs, No. 6.

FRAUD,

See Assignment.

FRAUDS, Statute of

1. On a motion for a new trial by a Defendant in an action againſt him for goods delivered to the uſe of a third perſon on his undertaking to ſee the Plaintiff paid, the Court will take into conſideration not only the expreſſions uſed, but the particular ſituation of the Defendant at the time of his undertaking, and the amount of the ſum for which he will thereby be made liable. *Keate* v. *Temple*, *M.* 38 *Geo.* 3. *Page* 158
2. A ſale of lands, though by auction is within the ſtatute of frauds, and therefore no action can be maintained upon it without a memorandum in writing. *Walker* v. *Conſtable*, *T.* 38 *Geo.* 3. 306
3. If *A.* agree with *B.* to let him land rent free, on condition that *A.* ſhall have a moiety of the two ſucceeding crops, the agreement need not be in writing under the ſtatute of frauds. *Semb. Poulter* v. *Kellingbeck*, *E.* 39 *Geo.* 3. 397

FREIGHT.

1. A ſhip bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of lading in *Jamaica* by a *French* privateer, but was afterwards recaptured, and carried into another port in the ſame iſland, where the cargo was ſold by order of the Court of Admiralty for the benefit of the freighters: Held, that the owners of the ſhip were not entitled to any part of the freight. *Curling* v. *Long*, *H.* 37 *Geo.* 3. 634
2. Though by the uſage of the trade, the ſhip was loaded at the expence of the owners. *ib.* *ib.*
3. For freight commences from breaking ground. *ib.* *ib.*

G

GUARANTY.

1. If *A.* become bound to *B.* for the honeſty of *C.* who embezzles money, *B.* may main-

tain an action on the guaranty, though three years have elapſed without any notice having been given of the embezzlement by *B. Peel* v. *Tatlock*, *E.* 39 *Geo.* 3. *Page* 419

2. At leaſt if *A.* was acquainted with the circumſtance from any other quarter, and *B.* does not appear to have concealed it from him induſtriouſly. *ib.* *ib.*

3. *A.* will not be diſcharged from his guaranty, though *B.* appear to have given credit to *C.* to the amount of the ſum embezzled. *ib.* *ib.*

H

HERIOT,

See Custom, No. 1.
Evidence, No. 8, 9.

HOLLAND,

See Bail, No. 1.

I

ILLEGAL CONTRACT,

See Money had and received.
Treating Act.

1. If *A.* receive money of *B.* to the uſe of *C.* it may be recovered by *C.* in an action for money had and received, though the conſideration on which *B.* paid it be illegal. *Farmer* v. *Ruſſell and Another*, *T.* 38 *G.* 3. 296

2. *Qu.* Whether the caſe would be varied if *A.* were a party to the contract between *B.* and *C.*? *ib.* *ib.*

3. Plaintiff was employed to waſh clothes for Defendant, who was a proſtitute, knowing her to be ſuch: Held, that the uſe, however immoral to which the clothes might be applied, could not bar Plaintiff of an action for work and labour. *Lloyd* v. *Johnſon*, *M.* 39 *Geo.* 3. 340

4. But to an action for the uſe and occupation of a lodging, proof that the lodging was let to the Defendant for the purpoſes of proſtitution, with knowledge on t [illegible] rt of the Plaintiff of that fact, is a ſufficient bar. *Criſp* v. *Churchill*, *E.* 34 *Geo.* 3. *Cited page* 340

5. To debt on bond, Defendant pleaded that the bond was given to ſecure payment of the price of goods agreed to be ſold and delivered in *London* by Plaintiff to Defendant, to be by the latter ſhipped for *Oſtend*, and from thence re-ſhipped for the *Eaſt Indies*, and there trafficked with clandeſtinely: held a ſufficient bar to the action, the caſe being within the 7 *Geo.* 1. *c.* 22. which avoids all contracts for ſupplying cargoes to foreign ſhips in ſuch a trade. *Lightfoot* v. *Tenant*, *M.* 37 *Geo.* 3. 551

INDEBITATUS ASSUMPSIT,

See Pleading, No. 18.

INDIA,

See East India Company.
Trade, No. 1, 2.

A. captain of an *Eaſt India* country trader, contracts in *India* with *B.* for a crew according to the cuſtom of the country; *A.* arrives in *England* with the crew, and then makes a voyage with them to the *Weſt Indies* and back again; whereupon part of the crew bring an action for wages due on the *Weſt India* voyage: Held on motion for a *mandamus* to examine witneſſes in the *Eaſt Indies*, that the cauſe of action did not ariſe in the *Eaſt Indies* within the 13th *Geo.* 3. *c.* 64. *ſ.* 44. *Franciſco* v. *Gilmore*, *M.* 38 *Geo.* 3. 177

INDICTMENT,

1. In an indictment on 37 *Geo.* 3. *c.* 70. it is ſufficient to charge an *endeavour* to ſeduce a ſoldier from his allegiance, and to incite him to mutiny, &c. without ſpecifying the means employed. *The King* v. *Fuller*, *M.* 38 *Geo.* 3. 180

2. Under a charge that *A. endeavoured* to incite

incite *B. being a ſoldier*, to mutiny, knowledge of *B.*'s being a ſoldier, is implied. *The King* v. *Fuller*, *M.* 38 *Geo.* 3. *P.* 180

3. And the word "adviſedly," if uſed in ſuch a caſe, is equivalent to *ſcienter*. *ib.* *ib.*

4. It ſeems that if one endeavour comprize two ſeparate offences, a count in an indictment charging that endeavour, may contain thoſe two offences. *ib.* *ib.*

INFANT,

See Bail, No. 16.
Trustee, No. 1, 2.

INQUIRY, Writ of

1. If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not expreſs any hour or place. *Jones* v. *Chune*, *One*, *&c. H.* 39 *Geo.* 3. 363

2. At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the Defendant to controvert any thing but the amount of the ſum in demand. *De Gaillon* v. *V. H. L'Aigle*, *H.* 39 *Geo.* 3. 368

INSOLVENT,

See Practice, No. 6.
Prisoner.

1. *A.* priſoner in execution in an action in the Tholſey Court at *Briſtol*, having been removed by *habeas corpus* to the Fleet, was diſcharged under the Lord's act, by the Court of Common Pleas. *Haſkins* v. *Morris*, *M.* 38 *Geo.* 3. 92

2. If a priſoner brought up to be diſcharged under *ſ.* 16. of the Lord's act, deliver in a falſe ſchedule and be remanded, the Court will not, at the inſtance of a creditor, order him to be brought up a ſecond time for the purpoſe of amending his ſchedule, and aſſigning over that property which he had before concealed. *Hutchins* v. *Heſketh*, *M.* 38 *Geo.* 3. 143

3. Even though the priſoner conſent. *ib.* *ib.*

4. A note for ſecuring the weekly allowance to a priſoner under the Lord's act need not be ſtamped. *Bowring* v. *Edgar*, *E.* 38 *Geo.* 3. (*Vid. et. Tekell* v. *Caſey*, 7 *Term Rep.* 670.) *Page* 270

5. Such a note cannot be ſigned by the creditor's attorney if his client be dead. *The King* v. *Davis*, *One*, *&c. M.* 39 *Geo.* 3. 336

6. It is no objection to a priſoner being diſcharged under the Lord's act that his creditor is dead. *ib.* *ib.*

7. An attorney in cuſtody on an attachment for not paying over money received by him in the courſe of a ſuit, may be diſcharged under the Lord's act. *ib.* *ib.*

8. The Court cannot, under the words of 37 *Geo.* 3. *c.* 8. *ſ.* 2. moderate the ſum to be paid to a priſoner on his being remanded, but a note muſt be ſigned for the full ſum directed by that act. *ib.* *ib.*

9. *A.* priſoner who is taken in execution for more than 300*l.* and afterwards reduces his debt below that ſum, is not entitled to be diſcharged under the Lord's act in the next Term after he has ſo reduced his debt, unleſs it be alſo the next Term after he was taken in execution. *Ex parte Hubbard*, *E.* 39 *Geo.* 3. 423

10. The Court of Chancery having refuſed to diſcharge a priſoner in cuſtody for not putting in an anſwer unleſs on payment of the fees, he applied to *C. B.* to be diſcharged under the inſolvent act, 34 *Geo.* 3. *c.* 69. but was refuſed, his contempt not conſiſting in the non-payment of money. *Ex parte Benjamin Lawrence*, *E.* 36 *Geo.* 3. 477

INSURANCE,

See East India Company, No. 2.

1. Sailing orders are neceſſary to the performance of a warranty to depart with convoy, unleſs particular circumſtances exempt the inſured from the general rule. *Webb* v. *Thompſon*, *E.* 37 *Geo.* 3. 5

2. In an inſurance on a ſhip at and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy, the voyages from *Hull* to *Portſmouth*,

Portſmouth, where ſhe meets with convoy, and from thence to *Bilboa*, may be conſidered as diſtinct: and in caſe of a loſs between the two latter places, an appointment and return of premium may be demanded. *Rothwell* v. *Cooke*, *M.* 38 *Geo.* 3. *Page* 172

3. Inſurance on a voyage from *C.* to *D.*, on a repreſentation that the ſhip was firſt to ſail from *A.* to *B.* and from *B.* to *C.*; the voyage from *A.* to *B.* was performed, but that from *B.* to *C.* being unavoidably prevented, the ſhip returned to *A.*, from thence proceeded immediately to *C.* and in performing the voyage from *C.* to *D.* was loſt; and this was held a good commencement of the voyage inſured. *Driſcol* v. *Paſſmore*, *M.* 38 *Geo.* 3. 200

4. Inſurance on a voyage from *A.* to *B*, from *B.* to *C.* and from *C.* to *A.*; the voyage from *A.* to *B.* is performed, but that from *B.* to *C.* being unavoidably prevented, the ſhip returns to *A.*; from whence the captain writes to his broker in *London*, requeſting him to obtain the opinion of the under-writers as to his proceeding directly to *C.* if the charterer ſhould inſiſt on it, and is anſwered by him that he thinks the policy at an end; at the inſtance of the charterer the captain does proceed to *C.* and on his return from thence to *A.* the ſhip is captured: Held, that the voyage inſured was never abandoned. *Driſcol* v. *Bovil*, *M.* 39 *Geo.* 3. 313

5. *A.* being indebted to *B.* without any order from him, conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C.* reſolved, that *B.* has an inſurable intereſt in the goods ſo conſigned. *Hill and Another* v. *Secretan*, *M.* 39 *Geo.* 3. 315

6. *A.* having conſigned a cargo to *B.* and drawn bills on him to the amount of it in favour of *C.* his general agent, ſends theſe bills together with the bills of lading to *C.* deſiring him to tranſmit them to *B.* "that *B.* may have an opportunity of inſuring;" he alſo draws a bill for 300*l.* on *C.* which is accepted; *B.* refuſes to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name and informs *A.* thereof, who approves of his conduct; in an action by *C.* ſtating himſelf in the firſt count to be the agent of *A.* and averring intereſt in him, and in the ſecond averring intereſt in himſelf: Held, Firſt, that the policy was good within the 28 *G.* 3. *c.* 56.; *Wolff and Others* v. *Horncaſtle*, *M.* 39 *G.* 3. *Page* 316

7. Secondly, that *C.* had an inſurable intereſt to the amount of 300*l.* *ib.* *ib.*

8. If the name of the broker, effecting a policy of inſurance, be inſerted in the policy as *agent* generally, without ſaying for whom, it is a ſufficient compliance with 28 *Geo.* 3. *c.* 56. *Bell and Others* v. *Gilſon*, *M.* 39 *Geo.* 3. 345

9. So it is if his name be inſerted in the policies, though not as agent. *De Vignier* v. *Swanſon*, *B. R.* *M.* 39 *Geo.* 3. 346 n. *b.*

10. Goods the produce of *Holland*, purchaſed in that country during hoſtilities between *Great Britain* and *Holland*, by a *Britiſh* agent reſident there, and ſhipped for *Britiſh* ſubjects, were inſured by them in this country: Held, that this was a legal inſurance. *Bell and Others* v. *Gibſon*, *M.* 39 *Geo.* 3. 345

11. In a policy againſt fire from half a year to half a year, the aſſured agreed to pay the premium half yearly "as long as the inſurers ſhould agree to accept the ſame," within fifteen days after the expiration of the former half year, and it was alſo ſtipulated that no inſurance ſhould take place till the premium was actually paid; a loſs happened within fifteen days after the end of one half year, but before the premium for the next was paid: Held, that the inſurers were not liable, though the aſſured tendered the premium before the end of fifteen days, but after the loſs. *Tarleton* v. *Staniforth in Error*, *E.* 36 *Geo.* 3. 471

INTEREST,

See Bond, No. 1.
Exchequer Chamber, Court of, No. 1, 2.

1. The net ſum received only without intereſt can be recovered in an action for money had and received. *Walker* v. *Conſtable, Trin.* 38 *Geo.* 3. *Page* 306

INTEREST INSURABLE,

See INSURANCE, No. 5. 7.

ISSUES,

See DISTRINGAS, No. 1, 2.
PRACTICE, No. 4. 38.

J

JOIN-TENANTS,

See TITHES, No. 3.

JUDGMENT,

See EXCHEQUER CHAMBER, Court of, No. 3.
EXECUTOR and ADMINISTRATOR, No. 2.
PRACTICE, No. 7. 27.

L

LANDLORD AND TENANT,

See ADMINISTRATION, No. 1, 2.
EJECTMENT.
PAYMENT, No. 1.

LEASE,

See ASSIGNMENT.
TRUSTEE, No. 1, 2.

1. Tenant for life leaſes premiſes for twenty-one years, and before the expiration of that term dies, the truſtees of the remainder-man, then an infant, continue to receive the rent reſerved, and he on coming of age, ſells the premiſes by auction; in the conditions of ſale the premiſes are declared to be ſubject to the leaſe, and in the conveyance to the purchaſer the leaſe is referred to as in the poſſeſſion of the leſſee, and in the covenant againſt incumbrances that leaſe is excepted; the purchaſer mortgages, and in the mortgage deeds the like notice is taken of the leaſe, and the mortgagees for ſome time receive the rent reſerved: held that the leaſe expired with the intereſt of the tenant for life, and that the notice ſince taken of it did not operate as a new leaſe. *Doe* d. *Potter* v. *Archer*, *T.* 36 *Geo.* 3. *age* 531

LEATHER.

1. A condemnation by four out of the ſix triers of leather, appointed under 1 *Jac.* 1. *c.* 22. (the whole number being met for the purpoſe of trying) muſt be conſidered as the condemnation of all ſix. *Grindley and Another* v. *Barker and Others*, *E.* 38 *Geo.* 3. 229

LIBEL.

1. A letter written by Defendant to a third perſon calling Plaintiff "a villain," is actionable though unſupported by proof of ſpecial damage. *Bell* v. *Stone*, *M.* 39 *Geo.* 3. 331
2. An action cannot be maintained for publiſhing a true account of the proceedings of a court of juſtice, however injurious ſuch publication may be to the character of an individual. *Curry* v. *Walter*, *E.* 36 *Geo.* 3. 523
3. *Qu.* Whether the matter of juſtification ought not to be pleaded? *ib.* *ib.*

LIMITATIONS, STATUTE of,

See PRACTICE, No. 22.

LORDS ACT,

See INSOLVENT.

M

MALICIOUS PROSECUTION,

See ACTION on the Caſe, No. 1, 2, 3.

MANDAMUS,

See INDIA CONTRACTS in No. 1.

MARKET.

1. If the grantee of a market under letters patent from the crown ſuffer another to erect a market in his neighbourhood, and uſe it for the ſpace of twenty-three years without interruption, he is by ſuch uſer barred of his action on the caſe for diſturbance of his market. *Holcroft* v. *Heel*, *E.* 39 *Geo.* 3. *Page* 400

2. *Qu.* Whether if no ſpecific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in ſuch caſe he can ſupport any action for an injury to his market? *ib.* *ib.*

MASTER AND SERVANT,

See Nuisance.

MISNOMER,

See Bail-piece.

1. The Plaintiffs ſue by the name of the mayor and burgeſſes of the *borough of Stafford*, and give in evidence a charter, by which they appear to have been incorporated by the name of the mayor and burgeſſes of the *borough of Stafford*, in the *county of Stafford*: this is not in bar. *Mayor and Burgeſſes of Stafford* v. *Bolton*, *E.* 37 *Geo.* 3. 40

2. But might have been pleaded in abatement. *ib.* *ib.*

3. Though if the variance had been in matter of ſubſtance, inſtead of mere matter of addition, ſo that no ſuch corporation as that mentioned in the declaration had appeared to have exiſted, it might have been in bar. *ib.* 44

4. Defendant being arreſted by the name of *F. H.*, put in bail by the name of *S. H.*; Plaintiff then declared thus: "*S. H.* arreſted by the name of *F. H.* was attached to anſwer," &c. Defendant without craving *oyer* pleaded in abatement of the writ that his name was *S. H.*; Plaintiff having treated this plea as a nullity, and ſigned judgment accordingly, the Court refuſed to ſet it aſide. *Murray* v. *Hubbart*, *H.* 37 *Geo.* 3. 645

MONEY HAD AND RECEIVED,

See Composition, Deed of, No. 1.
Illegal Contract.
Interest, No. 1.

1. A broker who has received the amount of of a loſs from the inſurers, to the uſe of the inſured, on account of an inſurance on *Britiſh* goods in an *Imperial* ſhip trading to the *Eaſt Indies*, in contravention of 7 *G.* 1. *ſt.* 1. *c.* 21. *ſ.* 2. and who has had no intimation from the inſurers to retain, ſhall not be allowed to ſet up the illegality of the contract as a defence, in an action by the inſured for money had and received. *Tenant* v. *Elliott*, *E.* 37 *Geo.* 3. *Page* 3

MUTINY,

See Indictment, No. 1, 2, 3.

N

NATURALIZATION,

See Subject.

NEW TRIAL.

1. Defendant brought a writ of error on the firſt day of Term; obtained a rule *niſi* for a new trial on the ſecond and juſtified bail in error before cauſe ſhewn; this was held to be no objection to his ſupporting the rule for a new trial, as a point of importance was depending which would have been ſhut out in the Court of Error. *Sir B. Hammett Knt. and Others* v. *Sir W. Yea*, *Bart.* *M.* 38 *Geo.* 3. 149 *n.*

2. Where no point has been ſaved at the trial, the Court will not ſet aſide a verdict on a queſtion of law, if the juſtice and conſcience of the caſe be with it. *Cox* v. *Kitchin*, *M.* 39 *Geo.* 3. 338

3. If the teſtimony of witneſſes on which a verdict has proceeded be founded on, and derive its credit from particular circumſtances, and thoſe circumſtances be afterwards clearly falſified by affidavit, the Court will grant a new trial. *Liſter*, *One*, &c. v. *Mundell*, *E.* 39 *Geo.* 3. 427

NOLLE PROSEQUI,

See PRACTICE, No. 11, 12.

NONSUIT,

See BANKRUPT, No. 7.

NONSUIT,

JUDGMENT AS IN CASE OF,

See PRACTICE, No. 2. 38.

1. Judgment as in caſe of a nonſuit may be entered up againſt the Demandant in a writ of right. *Almgill et ux.* v. *Pierſon and Others, M.* 38 *Geo.* 3. *Page* 103
2. Nor will the Court relieve him if he has conducted himſelf unfairly towards the Tenant in the courſe of the proceedings. *ib.*

NOTICE,

See BAIL, No. 13. 15.
BAIL BOND, No. 2.
BILLS of EXCHANGE, No. 4, 5, 6.
PRACTICE, No. 31.
TITHES, No. 1.

NUISANCE.

A. having a houſe by the road ſide, contracted with *B.* to repair it for a ſtipulated ſum, *B.* contracted with *C.* to do the work, and *C.* with *D.* to furniſh the materials: the ſervant of *D.* brought a quantity of lime to the houſe, and placed it in the road, by which the Plaintiff's carriage was overturned: held that *A.* was anſwerable for the damage ſuſtained. *Buſh* v. *Steinman, E.* 39 *Geo.* 3. 404

O

OBLIGATION,

See BOND.

P

PARDON,

See PLEADING, No. 15.

PARTITION.

1. The 8 & 9 *Will.* 3. *c.* 31. *ſ.* 1. which directs the form to be purſued in a writ of partition, applies only to caſes where the tenant does not appear. *Dyer* v. *Bullock and Others, M.* 39 *G.* 3. *Page* 344

PARTNERS,

See CONSIGNMENT, No. 1.

1. *A. B. C.* and *D.* were partners in a banking-houſe at *Liverpool*, and *C.* and *D.* alſo carried on a ſeparate mercantile concern in *London*; *J. S.* having accepted bills payable at the houſe of *C.* and *D.* employed *A. B. C.* and *D.* to get them paid accordingly, and agreed to depoſit with them good bills indorſed by him, for the purpoſe of enabling them ſo to do; *A. B. C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he depoſited; ſome of the bills ſo depoſited by *J. S.* were remitted by *A. B. C.* and *D.* to *C.* and *D.* upon the general account between the two houſes, and before any of the acceptances of *J. S.* became due both houſes failed, and *J. S.* was obliged to pay his own acceptances: held that the aſſignees of *C.* and *D.* were entitled to retain againſt *J. S.* the bills remitted to them by *A. B. C.* and *D.* *Bolton* v. *Puller, T.* 36 *Geo.* 3. 539
2. Held alſo, that it made no difference that one of the bills remitted did not arrive in *London* till after the bankruptcy of *C.* and *D.*, though ſent by *A. B. C.* and *D.* before that event. *ib.* *ib.*

PARTY WALLS

1. If the leſſee of a houſe at a rack-rent under-let it at an advanced rent, he is liable to contribute to the expences of a party-wall built under the 14 *Geo.* 3. *c.* 78. *Sangſter* v. *Birkhead, T.* 38 *Geo.* 3. 303

2. Nor is the operation of the ſtatute at all varied by any covenants to repair, entered into by the landlord and tenant. *Sangſter*, v. *Birkhead*, *T.* 38 *Geo.* 3. *Page* 303

PAUPER,

See Costs, No. 2, 3, 4.

PAYMENTS,

See Annuity, No. 6.
Bond, No. 3.

1. If *A.* tenant for life, ſubject to forfeiture, remainder over to *B.*, leaſe to *C.* for a term, and afterwards apprehending that he has forfeited, acquieſce in *B.*'s claiming and receiving the rent from *C.*, *A.*'s executor, on ſhewing that he acquieſced under a falſe apprehenſion, may recover from *C.* the amount of rent erroneouſly paid to *B.* *Williams, Executor, &c.* v. *Bartholomew*, *M.* 39 *Geo.* 3. 326

PAYMENT of money into Court,

See Practice, No. 24.
Tender, No. 1.

PENAL ACTION.

1. The Court will not give leave to compound in a penal action after verdict, unleſs the Defendant can ſhew circumſtances which entitle him to ſuch an indulgence. *Crowder* v. *Wagſtaff*, *E.* 37 *Geo.* 3. 18

2. In compounding a penal action on the poſt-horſe act, which gives coſts to the proſecutor, the Court will allow the proſecutor to receive the deficient duties (not amounting to 40*s.*) and full coſts of ſuit, though together exceeding the 40*s.* paid to the crown. *North q. t.* v. *Smart*, *T.* 37 *Geo.* 3. 51

PERJURY.

1. *Qu.* Whether any one giving his teſtimony under a commiſſion iſſuing out of a court of law for the examination of witneſſes in *Scotland*, could be convicted of perjury. *Calliand* v. *Vaughan*, *H.* 38 *Geo.* 3. 210

PLEADING,

See Costs, No. 5.
Covenant, No. 2.
Discontinuance, No. 1.
Evidence, No. 3, 4, 5, 6.
Executor and Administrator, No. 2.
Indictment, No. 1, 2, 3, 4.
Insurance, No. 6.
Libel, No. 2, 3.
Misnomer.
Practice, No. 20, 21. 42.
Tender, No. 1.
Variance, No. 6.

1. In debt for rent againſt a meſne aſſignee, the original leſſor cannot reply *per fraudem* to a plea of aſſignment, where the Defendant derives no benefit from the premiſes. *Taylor* v. *Shum and Others*, *E.* 37 *Geo.* 3. *Page* 21

2. *Qu.* Whether the replication *per fraudem* can *ever* be good to ſuch a plea? *ib.* *ib.*

3. If a declaration on a bail-bond conclude, "whereby an action hath accrued to the "Plaintiff to demand and have of the "*Principal* (inſtead of the bail) and that "the *Principal* hath not paid, &c." it is bad on ſpecial demurrer. *Morgan* v. *Sargent*, *T.* 37 *Geo.* 3. 58

4. If the replication to a plea in abatement of the writ begin "that the ſaid declaration ought not to be quaſhed," but conclude properly, it is well enough, for ſuch words may be rejected as ſurpluſage. *Sabine* v. *E. Johnſtone*, *T.* 37 *Geo.* 3. 60

5. The reverſion of lands demiſed to the Defendant for years is conveyed to *A.* and *B.* and the heirs of *B.* in truſt for *A.* and his heirs; *A.* declares ſingly on a covenant contained in the leaſe; and after ſetting out the above title *without averring the death of B.* ſtates himſelf to be "thereby ſeiſed of the reverſion in his demeſne as of fee." This is bad upon demurrer. *Scott* v. *Godwin*, *T.* 37 *Geo.* 3. 67

6. In actions on contracts, if all the parties having a right to ſue, are not made coplaintiffs, it is in bar. *ib.* 73

7. *Semb. contrà* in actions on torts. *Page* 75

8. But where all the proper parties are not made co-defendants, it is only in abatement. *ib.* 73

9. The plea *de injuriâ ſuâ propriâ abſq. tali cauſâ* to a cognizance for rent in arrear is bad upon ſpecial demurrer. *Jones* v. *Kitchin*, *T.* 37 *Geo.* 3. 76

10. It is only to be received, where the defence ſet up is matter of excuſe. *ib.* 80

11. Not where any right or intereſt is aſſerted. *ib.* *ib.*

12. Nor where the defence turns upon the plea of commandment; but the commandment muſt be anſwered. *ib.* *ib.*

13. The maſter, wardens, and commonalty of a company cannot ſue for a penalty forfeited to the maſter and wardens to the uſe of the maſter, wardens and company. *Feltmakers' Company* v. *Davis*, *M.* 38 *Geo.* 3. 98

14. The firſt count in a declaration in debt for a penalty under a by-law, ſet forth the charter empowering the company to make by-laws, the by-law made and the breach of it; the ſecond count omitting the above particulars, ſtated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made, *&c.*" and this count on ſpecial demurrer was held bad. *ib.* *ib.*

15. A pardon, if pleaded, muſt be averred to be under the great ſeal. *Bull* v. *Tilt*, *H.* 38 *Geo.* 3. 199

16. If the lord ſet up a cuſtom to have the beſt live or dead chattel as a heriot; *Qu.* if the tenant can modify that cuſtom by pleading another, that the homage ſhall aſſeſs a compenſation in lieu of the heriot? *Parkin* v. *Radcliffe*, *T.* 38 *Geo.* 3. 282

17. The omiſſion of "And thereupon the ſaid *J. S.* complains" in the beginning of a declaration of treſpaſs on the caſe, is no cauſe of ſpecial demurrer. *Dobſon* v. *Sir W. Hearne, Knt. and Another*, *H.* 39 *Geo.* 3. 366

18. *A.* agreed with *B.* to let him land, rent free, on condition that *A.* ſhould have a moiety of the crops; while the crop was on the ground it was appraiſed for both parties: *A.* declared in *indebitatus aſſumpſit* for a moiety of the value of the crops ſold to *B.* without ſtating the ſpecial agreement, and held that he might well do ſo, as the ſpecial agreement was executed by the appraiſement, and the action aroſe out of ſomething collateral to it. *Poulter* v. *Killingbeck*, *E.* 39 *Geo.* 3. *Page* 397

19. To debt for an eſcape, Defendant pleaded a negligent eſcape and voluntary return, ſince which the priſoner had been ſafely kept; Plaintiff in his replication admitted the negligent eſcape and voluntary return, but alleged that the priſoner had not been ſafely kept ſince that time, having again eſcaped, which was a different eſcape from that mentioned in the plea, and the ſame for which the action was brought; Defendant in his rejoinder traverſed the allegation that the priſoner had not been ſafely kept, and then pleaded to the latter part of the replication, as to a new aſſignment, a negligent eſcape, voluntary return and ſafe keeping ſince, in the ſame manner as in the plea; this latter part of the rejoinder was held bad on ſpecial demurrer. *Griffiths* v. *Eyles*, *E.* 39 *Geo.* 3. 413

20. A plea that if the priſoner eſcaped ſeveral times (without ſpecifying them) he returned as often, is bad. *ib.* *ib.*

21. If bail plead the bankruptcy of their principal in their own diſcharge, they muſt plead it circumſtantially, or it will be bad on ſpecial demurrer. *Donnelly* v. *Dunn*, *T.* 39 *Geo.* 3. 448

22. Or on general demurrer. *Beddome and Another* v. *Holbrook and Another*, *T.* 39 *G.* 3. 450 *n.* (*b*)

23. *Semb.* That it cannot be pleaded at all. *ib.* *ib.*

24. *A.* declared in caſe againſt *B.* for ſinking his boat, and after averring a non-feaſance in *B.* as the cauſe, ſtated him to have acted *with great force and violence* in accompliſhing the injury; *A.* recovered, and on error brought becauſe the action ſhould have been treſpaſs, not caſe, and becauſe the two actions were mixed, the Court referred the con-

concluding expreſſions to the non-feaſance ſtated, and held that the declaration would ſupport the judgment. *Turner* v. *Hawkins in Error*, *E.* 36 *Geo.* 3. *Page* 472

25. In an action on a promiſſory note by the indorſee againſt the maker, notice of the indorſement need not be averred. *Reynolds* v. *Davis*, *M.* 37 *Geo.* 3. 625

26. *Non damnificatus* cannot be pleaded to debt on bond conditioned for the payment of a ſum of money at a certain day, though it appear by the conditions to have been given by way of indemnity. *Holmes* v. *Rhodes*, *H.* 37 *Geo.* 3. 638

27. Debt on bond conditioned for *J. S.* rendering account to the Plaintiffs of all monies which he ſhould receive as their agent. Defendant pleads performance in the words of the condition; Plaintiffs reply that *J. S.* received divers ſums of money amounting to 2000*l.* belonging and relating to the Plaintiffs' buſineſs as their agent, and hath not rendered to the Plaintiffs on account of the ſaid 2000*l.* or any part thereof: this replication being ſpecially demurred to for generality, was held ſufficient. *Shum* v. *Farrington*, *H.* 37 *Geo.* 3. 640

PLEDGE,

See BILLS of EXCHANGE and PROMISSORY NOTES, No. 1, 2, 3.

PLEDGES,

See REPLEVIN, No. 1.

POLICY,

See INSURANCE.

POWER.

1. If an eſtate in fee be deviſed to a feme covert, with a power annexed to diſpoſe of the eſtate without the controul of her huſband, ſuch power is void, being inconſiſtent with the fee given in the firſt inſtance. *Goodill* v. *Brigham*, *H.* 38 *Geo.* 3. 192

PRACTICE,

See AFFIDAVIT.
AMENDMENT, No. 1.
ATTACHMENT.
ATTORNEY, No. 3.
BAIL.
BAIL BOND.
BAIL PIECE.
BANK ACT, No. 1. 2.
BANKRUPT, No. 10.
BOND, No. 1.
COURTS, No. 1, 2. 4, 5.
COSTS.
DISTRINGAS, No. 1, 2.
EXECUTION.
MISNOMER, No. 4.
PENAL ACTIONS, No. 1, 2.
PRISONER.
PROCESS, No. 1.
RIGHT, Writ of.
REPLEVIN, No. 3.
TENDER, No. 1.
VARIANCE, No. 2, 3, 4, 5.
VENDITIONI EXPONAS, No. 1.
VENUE.
VERDICT.
USURY, No. 3.

1. The Court will not put off a trial at the inſtance of the Defendant, on account of the abſence of a material witneſs, if he has conducted himſelf unfairly, or been the cauſe of any improper delay. *Saunders* v. *Pittman*, *E.* 37 *Geo.* 3. *Page* 33

2. The Court of *C. B.* will make the payment of coſts for not proceeding to trial a term of diſcharging a rule for judgment, as in caſe of a nonſuit. *Jolliffe* v. *Morris*, *E.* 37 *Geo.* 3. 38

3. The Court will not ſet aſide a regular judgment on an affidavit of merits, though bankruptcy is intended to be pleaded. *Evans* v. *Gill*, *T.* 37 *Geo.* 3. 52

4. It is in the diſcretion of the Court to put a Defendant under terms who moves to have the iſſues levied under ſeveral *diſtringas*'s reſtored to him on his appearance according to 10 *Geo.* 3. *c.* 50. *ſ.* 4. *Cazalet* v. *Dubois*, *T.* 37 *Geo.* 3. 81

5. The

5. The Court will not grant an attachment for non-performance of an award pending an action brought on the award; nor allow the Plaintiff to wave the action in order to apply for the attachment. *Badley* v. *Loveday*. *T.* 37 *Geo.* 3. 81

6. An order for the diſcharge of an inſolvent under the lord's act, *ſ.* 16. cannot be made by a Judge in Term time, though ſummonſes were taken out in vacation, and the order only delayed till the beginning of Term by an irregularity in the affidavit. *Hoſkins* v. *Morris*, *M.* 38 *Geo.* 3. 92

7. The Court will give leave in the firſt inſtance to enter up judgment on a verdict reduced by an award. *Higginſon* v. *Neſbitt* *M.* 38 *Geo.* 3. 97

8. The Court will not order a bail-bond to be delivered up to be cancelled, becauſe the place where the affidavit to hold to bail was ſworn is not mentioned in the jurat. *Symmers* v. *Waſon*, *M.* 38 *Geo.* 3. 105

9. A Defendant by perfecting bail above was held to wave all objections ariſing from the bank act, 37 *Geo.* 3. *c.* 45. to the ſufficiency of the affidavit on which he was held to bail. *Chapman* v. *Snow*, *M.* 38 *Geo* 3. 132

10. But length of time ſeems to be no ſuch waver. *Fenwick* v. *Hunt*, *M.* 38 *Geo.* 3. *B. R.* 133 *n.*

11. The Court will not allow a Defendant to ſtrike out the entry of a judgment of *nolle proſequi* entered by the Plaintiff on one of the counts of the declaration after it has been demurred to. *Milliken* v. *Fox and Another*, *M.* 38 *Geo.* 3. 157

12. Nor will the Court in that ſtage of the proceedings determine a queſtion of coſts reſpecting ſuch a count. *ib.* *ib.*

13. *C.* by virtue of an order from *B.* to receive all money due to him on a particular account, obtains three out of four inſtalments due from *A.* to *B.* on that account; theſe payments are afterwards queſtioned by *B.* who brings his action againſt *A.* for the whole ſum, and at the ſame time *C.* demands the fourth inſtalment: An application to the Court by *A.* to ſtay proceedings in the action againſt him by *B.* on his paying the fourth inſtalment to ſuch perſon as they ſhould appoint, was refuſed. *Macdonald* v. *Paſley*, *M.* 38 *Geo.* 3. 161

14. If a party proceed againſt a Defendant by action and indictment for the ſame aſſault, the Court will not compel him to make his election. *Jones* v. *Clay*, *H.* 38 *Geo.* 3. 191

15. Defendant before the action commenced quitted the kingdom, leaving another in poſſeſſion of his houſe and goods; Plaintiff having ſerved a ſummons to appear at the houſe, diſtrained the goods to compel an appearance; and held regular. *Sir Wm. Staines, Knt. and Another* v. *Johannot*, *H.* 38 *Geo.* 3. 200

16. The Court will not, by putting off a trial or other indirect means, compel a party to conſent to a commiſſion for the examination of witneſſes in *Scotland*. *Calliand* v. *Vaughan*, *H.* 38 *Geo.* 3. 210

17. Where contradictory verdicts have been found on a policy of inſurance, and a third action brought againſt another under-writer, the Court will not put off the trial to enable him to apply to a Court of Equity for a commiſſion to examine witneſſes in *Scotland* to the ſame facts which were given in evidence on the laſt trial. *ib.* *ib.*

18. At leaſt if he has obtained time to plead on the uſual terms. *ib.* *ib.*

19. It is not ſufficient to ſtick up a notice of declaration in the office, if the Defendant's laſt place of abode be known; for it ought to be ſerved there. *Holſten* v. *Culliford*, *H.* 38 *Geo.* 3. 214

20. To *aſſumpſit* on a bill of exchange, the Court will not allow a Defendant to plead the general iſſue, and that the bill was given on a ſtock jobbing tranſaction contrary to 7 *Geo.* 2. *c.* 8. *Shaw* v. *Everett*, *H.* 38 *Geo.* 3. 222

21. Nor the general iſſue and alien enemy to a declaration on a policy of inſurance. *Angerſtein* v. *Vaughan*, *H.* 38 *Geo.* 3. *ib. n. a.*

22. The

22. The Court will not reſtrain a Defendant from pleading the ſtatute of limitations on ſetting aſide a regular interlocutory judgment. *Maddocks* v. *Holmes and Others*, *E.* 38 *Geo.* 3. 228

23. A Defendant muſt take advantage of an irregularity in the writ before appearance. *Fox and Another* v. *Money*, *E.* 38 *Geo.* 3. 250

24. Payment of money into Court is an admiſſion of a legal demand only. *Ribbans* v. *Crickett*, *E.* 38 *Geo.* 3. 264

25. The Court will not make a rule on a Plaintiff who brings an action on a bond, to allow an officer of the ſtamp-duties to inſpect the bond, becauſe the Defendant ſuſpects it to be forged. *Chetwynd* v. *Marnell, Executor, &c.* *E.* 38 *Geo.* 3. 271

26. The Court will not allow a Plaintiff to ſign judgment, becauſe the Defendant refuſes to pay for half the paper-books delivered to the judges; this caſe being within the rule, *H.* 35 *Geo.* 3. *Fulham* v. *Bagſhaw*, *T.* 38 *Geo.* 3. 292

27. Plaintiff cannot ſign judgment for want of a plea without demanding one, though Defendant has neglected to take the declaration out of the office. *White* v. *Dent*, *M.* 39 *Geo.* 3. 341

28. Taking out a ſummons before a judge to ſtay proceedings on the bail-bond is a waver of any irregularity in the notice of declaration. *Davis, One, &c. Aſſignee of the Sheriff* v. *Owen and Another*, *M.* 39 *Geo.* 3. 342

29. So taking any ſtep in a cauſe is a waver of any irregularity. *ib.* 344

30. If a Defendant be ſuperſedeable for want of judgment being entered up in time, but not actually diſcharged, he cannot be detained in an action on the judgment. *Pierſon* v. *Goodwin*, *M.* 39 *Geo.* 3. 361

31. If notice of a writ of inquiry to be executed at a particular hour and place be continued, the notice of continuance need not expreſs any hour or place. *Jones* v. *Chune, One, &c.* *H.* 39 *Geo.* 3. 363

32. The Court of *C. B.* will not ſtay proceedings in an action on an attorney's bill brought ſubſequent to the order of a Judge of another Court for its taxation, but previous to that taxation having taken place. *Steventon, One, &c.* v. *Watſon and Others*, *H.* 39 *Geo.* 3. *Page* 365

33. Where judgment has gone by default on a promiſſory note, no irregularity previous to the judgment can be ſhewn as cauſe againſt referring the note to the prothonotary. *Pell* v. *Brown*, *H.* 39 *Geo.* 3. 369

34. Service of a declaration in ejectment on one of two tenants in poſſeſſion is good ſervice on both. *Doe ex dem. J. Bailey* v. *Roe*, *H.* 39 *Geo.* 3. 369

35. A Defendant cannot demand a bill of particulars till after appearance. *Kitchen* v. *Blanchard*, *H.* 39 *Geo.* 3. 378

36. The mere acknowledgment of the wife of the tenant in poſſeſſion that ſhe has received a declaration in ejectment, will not bind her huſband. *Goodtitle ex dem. Read* v. *Badtitle*, *H.* 39 *Geo.* 3. 384

37. Service of a declaration in ejectment on a perſon appointed by the Court of Chancery to manage an eſtate for an infant, is not ſufficient. *Goodtitle ex dem. Roberts and Wife* v. *Badtitle*, *H.* 39 *Geo.* 3. 385

38. The Defendant may rule the Plaintiff to enter the iſſue, and move for judgment as in caſe of a nonſuit in the ſame Term. *Peeters* v. *Throgmorton*, *E.* 39 *Geo.* 3. 387

39. The Court will not on motion ſtrike out a part of a plea which contains double matter. *Griffiths* v. *Eyles*, *E.* 39 *Geo.* 3. 413

40. The Court will not put off a trial on account of the abſence of a material witneſs, if by his evidence the defence of ſlavery is intended to be eſtabliſhed. *Robinſon* v. *Smyth*, *T.* 39 *Geo.* 3. 454

41. A replication taking iſſue on a plea of payment to debt on an annuity bond, muſt be ſigned by a Serjeant. *Ellis and Wife* v *Govey*, *T.* 39 *Geo.* 3. 469

42. In an order to enlarge the time for pleading, the firſt and laſt days are both reckoned incluſively. *Freeman* v. *Jackſon*, *E.* 36 *Geo.* 3. 479

43. If the damages given by a verdict be reduced by an award, under an order of *niſi prius*, which has been made a rule of court, the party is entitled to have the poſteà delivered to him without any application to the Court. *Grimes* v. *Naiſh*, *E.* 36 *Geo.* 3. *Page* 480

PREMIUM,

See INSURANCE, No. 2.

PRISONER,

See INSOLVENT.
PRACTICE, No. 30.
WARRANT of ATTORNEY, No. 1.

1. The Court will diſcharge a Defendant out of cuſtody who is in execution at the ſuit of a Plaintiff ſome time ſince deceaſed, on whoſe part no will has been proved, nor any adminiſtration granted, and whoſe family on notice of a motion for the above purpoſe declines interfering. *Broughton* v. *Martin*, *M.* 38 *Geo.* 3. 176

2. A priſoner after judgment againſt him, may, notwithſtanding the allowance of a writ of error, be charged in execution. *Fiſher* v. *M'Namara*, *T.* 38 *Geo.* 3. 292

3. The Court has no power to diſcharge a Defendant out of execution on the ground of a commiſſion of bankruptcy having been iſſued againſt him. *M'Maſter* v. *Kell*, *T.* 38 *Geo.* 3. 302

4. A priſoner in cuſtody on meſne proceſs is ſuperſedeable, unleſs a copy of the declaration be delivered before the end of the Term after the proceſs is returnable. *Blyth* v. *Harriſon*, *T.* 36 *Geo.* 3. 535

PRISONER AT WAR,

See ALIEN ENEMY, No. 1.

PRIVILEDGE,

See ATTORNEY, No. 1, 2.

PRIZE.

1. If goods, the produce of *Spain*, purchaſed for *Britiſh* ſubjects reſident here, by a neutral agent reſident in *Spain*, partly before hoſtilities between the two countries, partly after, and ſhipped for *England* on board a neutral veſſel oſtenſibly bound for *Oſtend*, be taken by a *Britiſh* privateer, they are lawful prize, though the ſhip will be reſtored. *Louiſa Margaretha*, Henſlop, 3d *April* 1781. *Page* 349 *n.*

PRIZE MONEY.

1. It ſeems that nothing but a power of attorney or a will complying with the proviſions of 26 *Geo.* 3. *c.* 63. and 32 *Geo.* 3. *c.* 34. will warrant a payment to third perſons of money due from the public to ſailors or marines. *Macdonald* v. *Paſley*, *M.* 38 *Geo.* 3. 161

PROCESS,

See AMENDMENT, No. 1, 2,
EXECUTION, No. 2. 3.
VARIANCE, No. 2, 3, 4, 5. 7.

1. If a *capias per continuance* be *teſte*'d on the ſame day as the original *capias*, a new original *capias* may be ſued out to warrant it, though ſuch new original bear *teſte* before the cauſe of action accrued. *Davis*, *One*, *&c. Aſſignee of the Sheriff* v. *Owen and Another*, *M.* 39 *Geo.* 3. 342

PROHIBITION.

1. The Court of Common Pleas has no power to iſſue an original writ of prohibition to reſtrain a Biſhop from committing waſte in the poſſeſſions of his ſee. *Jefferſon* v. *The Biſhop of Durham and Others*, *M.* 38 *Geo.* 3. 105

2. At leaſt at the ſuit of an unintereſted perſon. *ib.*

3. It ſeems that no Court of Common Law has that power. *ib.*

4. But it may be doubtful whether the Court of Chancery has not? *ib.*

PROMISE.

1. If one perſon make a promiſe to another for the benefit of a third, that third perſon may

maintain an action upon it. *Marchington v. Vernon and Others, G. H. Sittings, T.* 27 *Geo.* 3. *B. R.* *Page* 101 *n.*

PROMISES
TO PAY THE DEBTS OF THIRD PERSONS,

See FRAUDS, Statute of.

PROMISSORY NOTE,

See LORDS ACT, No. 1.
BILLS of EXCHANGE.

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RECOGNIZANCE,

See AMENDMENT, No. 2.
BAIL, No. 17, 18.

RECOVERY,

See COMMON RECOVERY.

REFERENCE,

See COSTS, No. 1.

REGISTRY,

See SHIP, No. 1.

RELEASE,

See BOND, No. 2.
EXECUTOR and ADMINISTRATOR, No. 4.

RENT,

See PAYMENT, No. 1.

REPLEVIN.

1. The action on the caſe againſt the Sheriff for taking inſufficient pledges in replevin, ought to be brought in the name of the perſon making cognizance where there is no avowant on the record. *Page* v. *Sir John Eamer Knt. and Another, H.* 39 *Geo.* 3. 378

2. A replevin bond may, under the 11 *Geo.* 2. *c.* 19. be aſſigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer and Others, Aſſignees, &c.* v. *Dudley and Others, E.* 22 *Geo.* 3. *B. R.* *Page* 381 *n.*

3. The Court will not ſtay proceedings in an action of replevin unleſs upon payment of the rent in arrear, together with all coſts, though the arrears were tendered before with coſts up to that time. *Hopkins* v. *Shrole, H.* 39 *Geo.* 3. 382

4. The condition of a replevin bond is not ſatisfied by a proſecution of the ſuit in the county court, but the plaint, if removed by *re. fa. lo.* into a ſuperior court, muſt be proſecuted there with effect, and a return made if adjudged there. *Gwillim* v. *Holbrook, E.* 39 *Geo.* 3. 410

RIGHT, WRIT OF,

See NONSUIT, Judgment as in caſe of, No. 1, 2.

1. The Court will not permit the *miſe* joined in a writ of right to be tried by a jury, inſtead of the grand aſſize, though both parties deſire it. *Galton* v. *Harvey, H.* 38 *Geo.* 3. 192

S

SALE,

See FRAUDS, Statute of, No. 2.
SHIPS, No. 1.

SERVICE,

See PRACTICE, No. 34. 36, 37.

SHERIFF,

See ATTACHMENT.
BAIL, No. 9.
ESCAPE.
REPLEVIN.
VENDITIONI EXPONAS.

SHIP,

See FREIGHT.

1. The indorſements on the certificate of regiſtry required by 7 & 8 *Will.* 3. *c.* 22 & 26. *Geo.* 3. *c.* 60. *ſ.* 16. need not be recited in the deed of aſſignment of a ſhip under *ſ.* 17. of the latter act. *Capadoſe* v. *Codnor*, *E.* 36 *Geo.* 3. *Page* 483

SHERIFF,

See ATTACHMENT, No. 1.
BAIL, No. 9.
ESCAPE.
REPLEVIN, No. 1.
VENDITIONI EXPONAS.

SLANDER,

See LIBEL.

SLAVERY,

See PRACTICE, No. 40.

SMUGGLING.

1. If goods prohibited from being ſold in this country by 11 & 12 *Will.* 3. *c.* 10. are taken out of a warehouſe, and put on board a veſſel as if for exportation, but in fact with a view to be relanded, they are liable to be ſeized, though no actual attempt to reland them has been made. *Wilſon* v. *Saunders*, *E.* 38 *Geo.* 3. 267

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See EXCISE, No. 1, 2.

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See INSOLVENT, No. 4.

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STAYING PROCEEDINGS,

See ANNUITY, No. 10.
BOND, No. 1.
PRACTICE, No. 28. 32.
REPLEVIN, No. 3.

SUBJECT.

1. A natural born ſubject of this country, admitted a citizen of the United States of *America*, either before or after the declaration of *American* independence may be conſidered a ſubject of the United States, ſo as to be entitled to any commercial privileges granted to the ſubjects of the United States by treaty. *Marryatt* v. *Wilſon in Error*, *E.* 39 *Geo.* 3. 430
2. Even though the ſubjects of this country be prohibited from exerciſing thoſe privileges. *ib.* *ib.*

SUGGESTION,

See COURTS, No. 1, 2. 4.

SUPERSEDEAS,

See PRACTICE, No. 30.
PRISONER, No. 2. 4.

1. A writ of error operates as a ſuperſedeas from the time of the allowance, not from the time of ſervice. *Gravall* v. *Simpſon*, *E.* 36 *Geo.* 3. 478

2. Bail muſt therefore be put in within four days from the former period. *Page* 478

SURETY,

See GUARANTY.

T

TENANTS,

See LANDLORD AND TENANT.

TENDER.

If Defendant bring money into Court on a plea of tender, Plaintiff may take it out, though he reply that the tender was not made before action brought. *Le Grew* v. *Cooke, M.* 39 *Geo.* 3. 332

TIME,

See GUARANTY, No. 1.
MARKET, No. 1.
PRACTICE, No. 42.

Reaſonable time is a queſtion of law. *Sheibell* v. *Fairbain, E.* 39 *Geo.* 3. 388

TITHES,

See EVIDENCE, No. 10.

1. If a compoſition for tithes be made by *A.* as proprietor, and he leaſe them to *B.* whoſe intereſt is afterwards put an end to by *A.* before any alteration is made in the compoſition, *A.* cannot determine it without ſix months notice. *Wyburd* v. *Tuck, T.* 39 *Geo.* 3. 458
2. If *A.* execute a leaſe of tithes to *B.* on a day ſubſequent to their ſeverance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on the 2 & 3 *Ed.* 6. *c.* 13. as the right to the tithe veſted in *A.* immediately on ſeverance. *ib.* *ib.*
3. *Qu.* Whether if one only of two joint tenants execute an aſſignment of a leaſe of tithes, the perſon claiming under that leaſe can ſupport an action for not ſetting them out? *Wyburd* v. *Tuck, T.* 39 *G.* 3. *P.* 458

TOLL,

See MARKET, No. 2.

If toll be merely *claimed* of the individual members of a corporation exempt from toll, an action will lie on the writ *de eſſendo quietum de Theolonio* in the name of the corporation. *The Mayor, &c. of London* v. *The Mayor, &c. of Lynn, E.* 36 *Geo.* 3. 487

TRADE,

See SUBJECT, No. 1, 2.

1. Under the treaty concluded in 1795 between this country and the United States of *America*, confirmed by 37 *Geo.* 3. *c.* 97. it is not neceſſary that the trade conceded to the *Americans* by the 13th article ſhould be direct from *America* to the *Britiſh* ſettlements in the *Eaſt Indies*. *Marryat* v. *Wilſon in Error, E.* 39 *Geo.* 3. 430
2. It may be carried on circuitouſly through any country in *Europe*, including *Great Britain*. *ib.* *ib.*

TRADING ILLEGAL,

See ILLEGAL CONTRACT, No. 5.
INSURANCE, No. 10.
PRIZE, No. 1.

TREATING ACT.

1. It being contrary to the 7 & 8 *Will.* 3. *c.* 4. for a candidate to furniſh proviſions to *any* voter, after the *teſte* of the writ, an innkeeper cannot recover againſt a candidate for proviſions ſo furniſhed at his requeſt. *Ribbans* v. *Crickett, E.* 38 *Geo.* 3. 264

TREES,

See COMMON.
EXECUTORS and ADMINISTRATORS, No. 3.

TRESPASS,

See EXECUTORS and ADMINISTRATORS, No. 3.
PLEADING, No. 24.

TRIAL,

See PRACTICE, No. 1, 2. 16, 17, 18. 40.

TROVER,

See BANKRUPTCY, No. 1. 9.

TRUSTEE,

See PLEADING, No. 5. 8.

1. If a perſon jointly intereſted with an infant in a leaſe, obtain a renewal to himſelf only, and the leaſe prove beneficial, he ſhall be held to have acted as truſtee, and the infant may claim his ſhare of the benefit. *Ex parte Grace, H.* 39 *Geo.* 3. *Page* 376
2. But if it do not prove beneficial, he muſt take it upon himſelf. *ib.* *ib.*

V

VARIANCE,

See EVIDENCE.
MISNOMER, No. 1, 2, 3.

1. The Plaintiff, a ſailor, declared for 52*l.* 10*s.* for run-money, and gave in evidence a note for 52*l.* 10*s.* for run-money, with an additional ſtipulation written after ſignature of the note, for a pint of rum *per* day, and it was held no variance. *Baptiſte* v. *Cobbold, E.* 37 *Geo.* 3. 7
2. The Court will not ſet aſide proceedings for irregularity where the Plaintiff ſues out a *quare clauſum fregit* againſt two, and declares againſt one only. *Spencer* v. *Scott, E.* 37 *Geo.* 3. 19
3. In caſes of proceſs not bailable, the writ may be againſt ſeveral Defendants, and the declaration againſt one only. *Stables and Another* v. *Aſhley and Others, E.* 37 *Geo.* 3. 49
4. In caſes of bailable proceſs it is otherwiſe. *ib.* *ib.*
5. Arreſt by the name of "*Weſton*;" declaration *de bene eſſe* againſt "*Waſon*," ſued by the name of "*Weſton*;" and held regular. *Symmers* v. *Waſon, M.* 38 *Geo.* 3. 105
6. Evidence of a houſe ſituate in the pariſh of *M.* will ſupport an averment of a houſe at *S.*; *S.* being extra-parochial, and both places uſually going by the name of *S.* *Burbige* v. *Jacques, E.* 38 *Geo.* 3. *P.* 225
7. If proceſs be ſerved in the name of one Plaintiff, and a declaration be delivered in the name of two, it is bad. *Rogers* v. *Jenkins, H.* 39 *Geo.* 3. 383

VENDITIONI EXPONAS.

The Court refuſed to grant an attachment againſt the Sheriff, becauſe he had returned to a writ of *venditioni exponas* that part of the goods levied remained in his hands for want of purchaſers. *Leader* v. *Danvers, M.* 39 *Geo.* 3. 359

VENUE.

1. In an action on a promiſſory note, the Court will not change the venue from *London* to the county where it was made, on the Defendant's ſtating that all his witneſſes live there. *Evans* v. *Weaver, E.* 37 *Geo.* 3. 20
2. But if his affidavit ſhew the number of his witneſſes, and that a ſerious inconvenience would ariſe from bringing them up, it will. *ib.* *ib.*
3. The Court will not change the venue in an action on a deed to the county where it was executed on the ground of the Defendant's witneſſes reſiding there, if from the pleadings it does not appear neceſſary to produce many witneſſes from that county unleſs a queſtion ſhould be raiſed of which a fair trial cannot be expected there. *Watt* v. *Daniel, E.* 39 *Geo.* 3. 425

VERDICT,

See NEW TRIAL.
PRACTICE, No. 43.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the court will amend

amend the verdict entering it on that count, though evidence was given applicable to the bad count alſo. *Williams, Executor, &c.* v. *Breedon, M.* 39 *Geo.* 3. *Page* 329

U

USURY.

1. *A.* being a banker in the country diſcounts bills at four months for *B.* and takes the whole intereſt for the time they have to run; *B.* on being aſked how he will have the money, directs part to be carried to his account, part to be paid in caſh and part by bills in *London*, ſome at three, ſome at ſeven, and ſome at thirty days ſight: and held not to be an uſurious tranſaction, ſo as to induce the Court to grant a new trial, ſince the ſurplus of intereſt taken by *A.* might be referable to the expences of remittance. *Sir B. Hammett, Knt. and Others* v. *Sir W. Yea, Bart. M.* 38 *Geo.* 3. 144
2. *Secùs*, if ſuch mode of remittance had been made a term of the loan. *ib.* *ib.*
3. The Court ſet aſide a warrant of attorney and judgment given to ſecure a loan which was ſworn to be uſurious in order to bring the queſtion of uſury before a jury, but refuſed to order a bill of exchange to be delivered up which had been given to procure the Defendant's releaſe out of execution on the judgment. *Edmonſon* v. *Popkin, E.* 38 *Geo.* 3. 270

W

WARRANT OF ATTORNEY,

See COMMON RECOVERY, No. 2. 4.
USURY, No. 3.

If a Defendant in cuſtody being about to execute a warrant of attorney to confeſs judgment be informed that it muſt be done in the preſence of an attorney on his part, and thereupon produce a perſon as ſuch, in whoſe preſence he executes the warrant of attorney, the Court will not ſet aſide the proceedings thereon, becauſe the perſon ſo produced by the Defendant was not an attorney. *Jeyes, One, &c.* v. *Booth, M.* 38 *Geo.* 3. *Page* 97

WASTE,

See PROHIBITION, No. 1, 2, 3, 4.

WAVER,

See PRACTICE, No. 9, 10. 23. 28, 29.

WAY, RIGHT OF.

One being ſeiſed in fee of the adjoining cloſes *A.* and *B.* over the former of which a way had immemorially been uſed to the latter, deviſes *B.* "with the appurtenances:" held that the deviſee cannot under the word "appurtenances" claim a right of way over *A.* to *B.*, as no new right of way is thereby created, and the old one was extinguiſhed by the unity of ſeiſin in the deviſor. *Whalley* v. *Tompſon and Another, H.* 39 *Geo.* 3. 371

THE END OF THE FIRST VOLUME.

Printed by A. Strahan, Law-Printer to His Majeſty,
Printers-Street, London.

G.R. III
BRITISH MUSEUM